Supreme Court, U.S.
FILED

No. _____

06-587 OCT 26 2006

In The
Supreme Court of the United States

OFFICE OF THE CLERK

THE STATE OF OKLAHOMA,
THE OKLAHOMA WATER RESOURCES BOARD,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

W. A. DREW EDMONDSON
Attorney General

SUSAN K. NOLAND*
Assistant Attorney General
OKLAHOMA ATTORNEY GENERAL'S OFFICE
Chief, Litigation Section
313 N. E. 21st Street
Oklahoma City, OK 73105
(405) 521-4274

M. DANIEL WEITMAN
Assistant Attorney General
OKLAHOMA ATTORNEY GENERAL'S OFFICE
313 N. E. 21st Street
Oklahoma City, OK 73105
(405) 521-4274

October, 2006

**Attorney of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This is a case involving a water storage contract between the State of Oklahoma and the United States. The contract incorporates Oklahoma's debt limitation laws by stating that the agreement does not invoke the full faith and credit of the State and further that the State Legislature is not required to appropriate monies to pay the obligation. This limitation in the agreement is permitted pursuant to 42 U.S.C. §1962b-5b. In an action by the United States to enforce the agreement against the State, the federal district and circuit court held that the State's debt limitation laws do not apply to the interpretation of the water storage contract and the agreement could be enforced in the Federal Court. The questions for this Court are thus:

I. Whether a multi-year water storage contract entered into between the State of Oklahoma and the United States which specifically does not pledge the full faith and credit of the State is enforceable in by a money judgment in federal court when there has been no appropriation of monies by the State Legislature to pay the debt and there have been no monies generated by the object of the agreement?

II. Whether a federal district court, in hearing a case regarding a water storage contract between the United States and Oklahoma, must apply Oklahoma's constitutional debt limitation as interpreted by the State's highest court when the contract incorporates the State's constitutional debt limitation law in accordance with the Flood Control Act, 42 U.S.C. §1962d-5(a)?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding on Petition for Writ of Certiorari are:

Respondent/Plaintiff/Appellee:

The United States of America

Petitioner/Defendant/Appellant:

The State of Oklahoma, The Oklahoma Water Resources Board

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties To The Proceeding	ii
Table of Authorities	iv
Citation Of Official and Unofficial Reports	1
Basis Of Jurisdiction	1
Statutes And Ordinances Involved In Case	1
Statement of the Case	4
A. Background	4
B. Underlying Facts Of The Case At Bar	6
C. The District Court Case	8
D. The Circuit Court Of Appeals Decision	12
Argument Amplifying Reasons For The Allowance Of This Writ Of Certiorari	13
A. This Case Presents A Novel Question Of Law Which Must Be Settled By This Court	13
B. The Issue Presented Is Of Great National Significance	15
C. The Court of Appeals Ruling Was in Error	19
Conclusion	20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Kossic v. United Fruit Co., 365 U.S. 731, 81 S. Ct. 886 (1961) 13

Port Arthur Housing Finance Corp. v. United States, 773 F. Supp.1 (E.D. Tx. 1991) 15

United States v. Indep. Sch. Dist. No. 1, 209 F.2d 578 (10th Cir. 1954) 12, 14

FEDERAL STATUTES

16 U.S.C. §1456a(d)(1) (1976) 15

28 U.S.C. §1254(1) 1

28 U.S.C. §1345 8

42 U.S.C. §1962d-5b ..... *passim*

43 U.S.C. §390b 1, 2, 8

STATE CASES

Application of Oklahoma Capitol Improvement Authority, 958 P.2d 759 (Okla. 1998) 5, 11, 14

Chicago R.I. & P. Ry. Co. v. Excise Board of Garfield County, 30 P.2d 171 (Okla. 1934) 17

Dept. Of Ecology v. State Fin. Comm., 804 P.2d 1241 (Wash. 1991) 16

Fent v. Okla. Capitol Improvement Authority, 984 P.2d 200 (Okla. 1999) 11

Lonegan v. State, 819 A.2d 395 (N.J. 2003) 5, 15, 16

Petition of University Hospital Authority, 953 P.2d 314 (Okla. 1997) 14

TABLE OF AUTHORITIES – Continued

Page

State Ex rel. Douglas v. Thone, 286 N.W.2d 249 (Neb. 1979) 17

Wilson v. Ky. Transp. Cabinet, 884 S.W.2d 641 (Ky. 1994) 15

STATE STATUTES

82 Okla. Stat. §1085.21 3

STATE CONSTITUTIONAL PROVISIONS

Okla. Const. Art. 10 §23 ..... 2, 5, 13

Okla. Const. Art. 10 §24 ..... 2, 5, 13

Okla. Const. Art. 10 §25 ..... 3, 5, 13

OTHER RESOURCES

S.Rep. 99-126, reproduced in 1986 U.S.C.C.A.N. 6639 ..... 6, 14, 16

Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations, 1991 Wis. L. Rev. 1301, 1315 ..... 5, 13

Supreme Court Rule 10(c) 13

Supreme Court Rule 12(3) 1

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The United States of America v. State of Oklahoma; Oklahoma Water Resources Board, 2006 WL 1587498 (10th Cir. 2006)

BASIS OF JURISDICTION

(A) Date of Judgment to be reviewed: June 12, 2006

(B) Date of Denial of Rehearing: July 31, 2006

(C) Statutory provision conferring jurisdiction:

Jurisdiction is in this Court pursuant to Water Supply Act of 1958, 43 U.S.C. §390b-390f and §221 of the Flood Control Act, 42 U.S.C. §1962d-5b and pursuant to 28 U.S.C. §1254(1). The 10th Circuit denied rehearing on July 31, 2006. This Petition is filed within 90 days from that date. S. Ct. R. 13(3).

STATUTES AND ORDINANCES INVOLVED IN CASE

42 U.S.C. §1962d-5b(a)

> After December 31, 1970, the construction of any water resources project, or an acceptable separable element thereof, by the Secretary of the Army, acting through the Chief of Engineers, or by a non-federal interest where such interest will be reimbursed for such construction under the provisions of section 1962d-5a of this title or under any other provision of law, shall not be commenced until each non-federal interest has

ered into a written agreement with the Secretary of the Army to furnish its required cooperation for the project or the appropriate element of the project, as the case may be; except that no such agreement shall be required if the Secretary determines that the administrative costs associated with negotiating, executing or administering the agreement would exceed the amount of the contribution required from the non-federal interest and are less than $25,000. In any such agreement entered into by a State, a body politic of the State which derives its powers from the State constitution, or a governmental entity created by the State Legislature, the agreement may reflect that it does not obligate future appropriations for such performance and payment when obligating future appropriations would be inconsistent with constitutional or statutory limitations of the State or a political subdivision of the State.

42 U.S.C. §1962d-5b(e)

This section shall not apply to any project the construction of which was commenced before January 1, 1972, or to the assurances for future demands required by the Water Supply Act of 1958, as amended.

43 U.S.C. §390b

Okla. Const. Art. 10 §23

Reproduced in Appendix

Okla. Const. Art. 10 §24

In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or to defend the State in war, but the money arising from the contracting

of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatsoever.

Okla. Const. Art. 10 §25

Except the debts specified in sections twenty-three and twenty-four of this article, no debts shall be hereafter contracted by or on behalf of this State, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either house of the Legislature, the question shall be taken by yeas and nays, to be duly entered on the journals thereof, and shall be: "Shall this bill pass and ought the same to receive the sanction of the people?"

82 Okla. Stat. §1085.21

Agreements with federal agencies – Cost of reimbursement

Whenever any project or plan for the construction or enlargement of any dam, reservoir or other structure includes within its design and specifications provisions for the development of water supplies for domestic, municipal, agricultural, industrial and other purposes the Commission is hereby directed to negotiate with the municipalities or other local interests of this

state and its agencies and the federal government or its responsible agency, department or instrumentality for the purpose of determining the cost of reimbursing the federal government for the allocated cost of including such municipal, agricultural and industrial water storage within such construction. Any available storage for such purposes which cannot reasonably be used within the present or estimated future firm demands of local users may be contracted for by the Commission in order to assure the federal government that such added cost will be provided as authorized by federal law, and that necessary funds for any charges shall be paid by the Commission to the federal government pursuant to such contract and applicable federal law after examination and determination by the Oklahoma Water Resources Board that such charges are in harmony with existing federal law and policy at the time that the projects are built and the contracts between the Commission and the federal government are executed. In cases where all necessary costs to provide maximum conservation storage in a site cannot be contracted for between the federal government and the Commission because of limitations on the participation by the federal government, the Commission shall have the authority to provide funds covering those costs.

STATEMENT OF THE CASE

A. BACKGROUND

Oklahoma has written into its Constitution limitations on the debt which can be incurred by the State. Generally, the State cannot incur any debt except debt to

avoid incursion or to provide a defense in war. Okla. Const. Art. 10 §§23, 24, 25. Debts can also be incurred if there is specific legislation for the debt and a direct tax dedicated to retiring the debt within twenty years. Okla. Const. Art. 10 §25. This has been interpreted by the Oklahoma Supreme Court to mean that, with the exception of the items mentioned above, the State may not enter into multi-year obligations which pledge the State's full faith and credit. To avoid this limitation, the Legislature and State agencies may enter into multi-year contracts which do not invoke the full faith and credit of the State and therefore do not require appropriations of money by the State. Vendors who deal with the State must accept that the Legislature may choose not to appropriate funds to pay the vendor. See generally: *Application of Oklahoma Capitol Improvement Authority*, 958 P.2d 759 (1998).

This type of debt limitation is commonplace in State constitutions and has been incorporated into State constitutions since the 1800's. See: *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L. Rev. 1301. The purpose behind these debt limitations is because of concerns about binding obligations on future tax payers and because of unchecked speculation by the States. *Id.*; *Lonegan v. State*, 819 A.2d 395 (N.J. 2003). States with this type of debt limitation hold that when a contract based debt is issued, the State does not pledge its full faith and credit and the State is not legally bound to make payment on that debt. *Lonegan* at 14, 15 and cases cited therein.

The federal government has enacted a policy of assisting States with public works projects. An example of this is the federal policy in assisting States with water storage facilities (lakes). When a State accepted the

assistance in building lakes, a State is required to pay its part in the building and operation of the lake. The United States fronts these costs but then expects the State to pay its part in annual installments. This agreement between the United States and the State is set out in a water storage contract. The governments policy of assisting States with water storage was not being fulfilled, however, because, at least in part, States were not permitted to enter into these multi-year obligations with the federal government (which invoked the State's full faith and credit) due to their constitutional debt limitations. To rectify this problem, Congress permits States to add language to the water storage contracts stating that the State does not pledge the its full faith and credit to the United States. See: 42 U.S.C. §1962d-5b; *S.Rep. 99-126, at 16, 17.* In this manner, States can enter into the water storage agreements with the United States and the agreements do not violate the States' constitutional debt limitations.

B. UNDERLYING FACTS OF THE CASE AT BAR

In February, 1974, the United States of America (United States) and the State of Oklahoma (State) entered into a water storage contract, No. DACW56-74-C-0134 (Water Storage Contract), for the construction, operation and maintenance of Clayton Lake (now Sardis Lake) in Southeast Oklahoma. The contract set forth that the Corps of Engineers would build and operate the lake and that the State would be required to pay a sum to be determined for the construction, operation and maintenance of the lake. The sum was to be paid in 50 annual payments. However, the contract conditioned the installment payment provision

on two particular clauses under Article 14. The clauses state as follows:

> (A) In acting under its rights and obligations hereunder, the User agrees to comply with all applicable Federal and State laws and regulations.
>
> (C) The parties agree that this Contract is not an obligation for which the full faith and credit of the State of Oklahoma is pledged. Nothing herein shall be construed as legally obligating the Oklahoma Legislature to make any appropriations of funds.

Paragraph (C), added to the contract by the United States, were initialed by a representative of State and the Assistant Secretary of the Army of the United States.

The Contract was approved by then Oklahoma Attorney General, Larry Derryberry, with his opinion statement as follows:

> It is my opinion that this contract is within the authority of the contracting agency and in reaching this conclusion I have considered the effect of Section 221 of the Flood Control Act of 1970 (42 USC 1962d-5b).

With appropriated funds on hand at the time, the State made eight annual payments under the contract and after March of 1990 only made two partial payments under the contract. There have been no payments made since 1997. Thereafter, United States has declared Oklahoma to be in default of the obligation.

C. THE DISTRICT COURT CASE

In July 1998, the Unites States filed suit against Oklahoma alleging a breach of the water storage contract. The Federal District Court for the Northern District of Oklahoma assumed jurisdiction pursuant to the Water Supply Act of 1958, 43 U.S.C. §390b-390f and §221 of the Flood Control Act, 42 U.S.C. §1962d-5b and pursuant to 28 U.S.C. §1345. The United States asked for the following relief:

> 1. A Declaratory Order that the Water Supply Storage Contract number DACW56-74-C-0134 is valid;
>
> 2. A Declaratory order the Defendants currently owe to the Plaintiff $14,320,821.02 for past due present use water supply storage costs;
>
> 3. A Judgment for the United States against the Defendants in the amount of $14,320,821.02 for such past due present use water supply storage costs;
>
> 4. Declaratory judgment that Defendants are required to pay the amount of $15,148,187.90 for the remaining present use water supply storage investment costs when such use begins in annual installments, or payment in full on January 6, 2033, if such use does not occur;
>
> 5. Declaratory judgment that Defendants are required to pay the amount of $19,760,089.00 for the remaining future use water supply storage investment costs when such use begins in annual installments, or payment in full on January 6, 2033 if such use does not occur;
>
> 6. Declaratory Judgment that the Defendants are required to pay the amount of $10,521,795.64

for the cost of accrued interest at 4.012% per year and compounded annually accruing between January 31, 1993 on the future use water supply storage up until December 6, 2003 when billed by the Corps of Engineers. If the future use water supply storage is not used before January 6, 2033, it is due in full on January 6, 2033;

7. Declaratory Judgment that the Defendants are required to pay the cost of accrued interest at 4.012% per year and compounded annually accruing between December 6, 2003 and January 6, 2033 on the future use water supply storage. If the future use water supply storage is not used before January 6, 2033, such payment shall be due in full on January 6, 2033;

8. Declaratory judgment that the Defendants are required to pay the sum of $481,045.00 for the costs of the intake structure authorized by Public Law 98-63. The Defendants are ordered to repay these costs when they begin to utilize the future water supply storage. The costs of the intake structure are due in full on January 6, 2033 if not used before that date.

9. Declaratory judgment that the Defendants are required to pay the costs of annual operation and maintenance costs which occur after the entry of this order, when notified by the Corps of Engineers of the amount due;

10. Defendants are permanently enjoined and directed to make all payments under the contract established by this Order within 90 days after written notice by the Corps of Engineers that such payments are due;

> 11. Defendants are further enjoined from taking any action hereafter which will result in a breach of contract number DACW56-74-C-0134.

Through this pleading, the United States asserted and alleged that Oklahoma currently owed the United States over $14 million for past due payments and interest on "present use" water supply storage costs, that the balance of all present use water supply storage and operating costs remaining after the $14 million arrearage is paid in a lump sum must be paid annually according to the contract, with all outstanding balances to be paid no later than 2033, fifty years after the lake was completed.

On January 23, 2004, Oklahoma responded to United States' Motion for Summary Judgment and brought a Cross-Motion for Summary Judgment. Oklahoma argued that by virtue of the express conditions in the contract, the only way that the obligations created by the contract could be enforced in the Court was after the legislature appropriated monies to pay the obligation or other revenues from use of storage at the lake are generated, and then only to the amount appropriated or generated.[1] If the State legislature did not appropriate the monies, then the United States could not sue to enforce the obligation because there was no appropriation over which enforcement could be had. This limitation on enforcement of the agreement was due to Oklahoma's constitutional debt limitation which was specifically incorporated into the

[1] It should be noted that Oklahoma agrees that the obligation to the United States is valid. Oklahoma asserts that the Court may not enforce the obligation without an appropriation of money and then even if money is appropriated, the obligation is only enforceable by a Court to the amount of appropriation.

contract with the United States. (Okla. Const. Art. 10 §23, 24, 25). The Oklahoma Supreme Court has interpreted this debt limitation as to apply to all multi-year contracts entered into by the State. See: *Application of Oklahoma Capitol Improvement Authority*, 958 P.2d 759 (Okla. 1998), *Fent v. Okla. Capitol Improvement Authority,* 984 P.2d 200 (Okla. 1999).

On May 19, 2005, the Northern District of Oklahoma issued its Order regarding the parties Motions. In its Order the Court stated:

> The Court finds that these cases [*Application of Oklahoma Capitol Improvement Authority*, 958 P.2d 759 (1998) and *Fent v. Oklahoma Capitol Improvement Authority*, 984 P.2d 200 (1999)] are not dispositive or helpful to the analysis in this case because they are dealing with bonds created by statute and not a contract.

This statement flies in the face of Oklahoma Supreme Court precedents as the Oklahoma Supreme Court has stated that this doctrine applies to not only bonds but leases and contracts as well. *Application of Oklahoma Capitol Improvement Authority*, 958 P.2d 759, 769 (Okla. 1998). Based on this error in the application of the Oklahoma debt limitation law, the Court then granted the Summary Judgment of the United States and denied the cross-Summary Judgment of State. The Court then entered Judgment in favor of the United States and against Oklahoma in accord with its Order filed on the same date. The Judgment does not state with any specificity which requested relief it is granting or the amounts of any judgment awarded.

D. THE CIRCUIT COURT OF APPEALS DECISION

Oklahoma appealed to the 10th Circuit Court of Appeals putting forth the same arguments brought before the district court. The Court of Appeals affirmed the district court ruling. In doing so, the Court of appeals held that federal law, solely, controls and that Oklahoma is in error in attempting to apply State constitutional provisions to the matter. The Court stated:

> The Board's assertion that the district court erred in granting summary judgment in favor of the United States is based on the erroneous premise the Oklahoma Law controls the United States' contract claim.

The court then held, relying on the principal of *recoupment* as set forth in *United States v. Indep. Sch. Dist. No. 1*, 209 F.2d 578 (10th Cir. 1954) (when the federal government overpays a State, the federal government is entitled to the return of its overpayment), that federal law permitted the United States to sue to enforce the contract even if there has been no appropriation by the State Legislature to pay the contract. The court did not cite to any contract cases between the United States and a State. Nor did the court cite any cases dealing with State limitation laws. Further, the court never discussed the inclusion of the debt limitation wording in the water storage contract.

Oklahoma requested rehearing alleging that the Circuit Court *utterly failed to consider* contractual language incorporating State constitutional debt limitation laws into the contract in conformance with 42 U.S.C. §1962d-5b(a). On July 31, 2006, the Circuit Court of Appeals denied rehearing.

ARGUMENT AMPLIFYING REASONS FOR THE ALLOWANCE OF THIS WRIT OF CERTIORARI

A. THIS CASE PRESENTS A NOVEL QUESTION OF LAW WHICH MUST BE SETTLED BY THIS COURT

Certiorari should be granted in this matter because a United States Court has decided an important issue of federal law which must be settled by this Court. *Sup. Ct. R. 10(c).* It is a novel issue implicating the interplay between federal law and State law. See generally, *Kossic v. United Fruit Co.,* 365 U.S. 731, 81 S. Ct. 886 (1961). This case allows opportunity to determine whether one provision of federal law about general enforceability of a water storage contract requires a court to disregard another provision of the very same federal law that authorizes water supply contracts with States to include a recognition of the State's constitutional debt limit. Particularly at issue in this matter is a water storage contract entered into between the State of Oklahoma and the Army Corps of Engineers is interpreted solely by federal law when the contract incorporates the State's debt limitation laws and/or whether federal law incorporates the State's debt limitations law into the Flood Control Act through 42 U.S.C. §1962d-5b(a).

More than three-quarters of the States have constitutional debt limitation laws. *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L. Rev. 1301, 1315. Oklahoma's debt limitation law states that the State may not enter into multi-year obligations which commits the full faith and credit of the State of Oklahoma. See: Okla. Const. Art. 10 §§23, 24 and 25. This is so because one legislature cannot bind the next to make appropriations. *Petition of*

University Hospital Authority, 953 P.2d 314 (Okla. 1997) (Kauger, C.J., concurring). The Oklahoma Supreme Court has interpreted this constitutional limitation and determined that multi-year obligations entered into by the State are enforceable but only to the extent that money is actually appropriated to pay the debt or when a debt is self liquidating and actually produces income. Then the obligation is enforceable only up to the amount appropriated or produced by the object of the contract *Application of Oklahoma Capitol Improvement Authority*, 958 P.2d 759 (Okla. 1998). Without an appropriation, there is nothing which can be enforced by the Court. *Id.*

Congress has recognized that the State debt limitations were problematic when it comes to water storage contracts because these contracts, such as the one at issue, typically require multi-year repayment schedules to the Corps of Engineers. States were not permitted to enter into such contracts. See: *S.Rep. 99-126, at 16, 17, reproduced in 1986 U.S.C.C.A.N. 6639.* Because of this, in 1986 Congress amended the Flood Control Act to include a statement that the water storage agreements can incorporate State debt limitation laws. 42 U.S.C. §1962d-5b(a). This Amendment to the Flood Control Act was made retroactive to 1972. 42 U.S.C. §1962-5b(e). The significant question, then, is what effect the incorporation of the State debt limitation laws have on the interpretation and enforceability of the water storage contracts? This Court has never spoken on this issue.

Because of the lack of prior guidance from this Court, the Court of Appeals rested its decision on recoupment cases which hold that when the federal government overpays a State, the Federal government is entitled to recoup the overpayment. See: *United States v. Indep. Sch.*

Dist. No. 1, 209 F.2d 578 (10th Cir. 1954). This was the closest case by analogy found by the Court and is not truly indicative of the proper application of law in this matter as the case relied on the doctrine of recoupment and not on doctrines of contract law or on the application of State debt limitations to contractual obligations entered into by the State.

While this Court has not spoken to the issue at hand and the parties have found no reported circuit decisions, at least one district court found that a contract which does not invoke the full faith and credit is only enforceable from proceeds which are the object of the agreement. *Port Arthur Housing Finance Corp. v. United States,* 773 F. Supp. 1 (E.D. Tx. 1991) (citing to the Coastal Zone Management Fund, 16 U.S.C. §1456a(d)(1)(1976), which provided that a State did not have to invoke its full faith and credit when gaining loan assistance from the United States). Because of the lack of guidelines on this novel issue of federal law, this Court should grant certiorari and speak to this issue.

B. THE ISSUE PRESENTED IS OF GREAT NATIONAL SIGNIFICANCE

At least 43 States have lakes which were built by the Corps of Engineers and the Corps controls up to 463 lakes. See: *Army Corps of Engineers Website:* http://www.usace.army.mil/public.html. Most of these 43 States have debt limitation laws which control the extent to which a State may enter into a multi-year obligation. Many have the same limitations that Oklahoma has. See, e.g., *Lonegan v. State*, 819 A.2d 395 (N.J. 2003); *Wilson v. Ky. Transp.*

Cabinet, 884 S.W.2d 641, 644 (Ky. 1994); *Dept. Of Ecology v. State Fin. Comm.*, 804 P.2d 1241 (Wash. 1991).

In 1986, Congress determined that the federal water resources development program had been in serious decline for a number of years. *S.Rep. 99-126 at 3.* In Response, Congress amended the Flood Control Act to permit States to enter into agreements with the United States for the building of lakes without pledging the State's full faith and credit. *Id.* (This Amendment was made retroactive to 1972). States are anticipated to rely on this provision and should expect that their debt limitation laws will be protected through this statutory amendment. In fact, Congress recognized that a State may not pay the obligation because of this new provision and discussed provisions needed to apply sanctions when the State does not pay in a timely manner. This was meant to be an incentive to pay timely. *S.Rep. 99-126 at 16-17.* Clearly, there was some expectation in Congress that the Flood Control Act as amended could cause States to have no *requirement* to repay the United States in a timely fashion.

This issue is of great importance in that the States need to be assured that their debt limitation laws will be applied to water storage contracts with the United States. This is true for a couple of reasons. First, States, such as Oklahoma, are required to adhere to balanced budget laws. Legislatures need to know whether the payment of a debt to the United States must be accounted for in each fiscal budget. Without this knowledge, a State cannot plan its successive fiscal policies. In order to plan future budgets, States rely on State Supreme Court precedents regarding the complex financing mechanisms. *Lonegan*, supra at 397.

Second, if a State's constitutional debt limitation does not apply to the interpretation of the contract, then a Legislature or a State agency would be violating its own constitution by entering into the agreement with the United States for water storage. This would leave the State open to State court lawsuits and, in all probability, State court rulings that the obligation is void because it violates the State's constitution. See, e.g., *Chicago R.I. & P. Ry. Co. v. Excise Board of Garfield County*, 30 P.2d 171 (Okla. 1934), *State Ex rel. Douglas v. Thone*, 286 N.W.2d 249 (Neb. 1979). This leaves everyone in the unenvious position of having a federal court determine that the State's debt limitation laws do not apply to the interpretation of the water storage contract and therefore the State must pay the obligation timely, but then having the State Courts determine that the debts are void for violating the State's constitution. This major conflict between State constitutional law and federal law will not serve the States nor will it serve the federal interest in maintaining its water resources development program. The States will still not be permitted to enter into water storage agreement because their debt limitation laws will not be incorporated into the agreements.

For this Court, the case at bar is factually the perfect case on which to rule and to add guidance in the area. Oklahoma had its debt limitation laws specifically built into Article 14 of the water storage contract as permitted by federal statute. The Oklahoma legislature has not recently appropriated funds to pay the contract nor has any water from the lake been sold. The United States sued to enforce the contract because Oklahoma had not made payment since 1997. Relying on its debt limitation laws, Oklahoma posits that the United States cannot sue to enforce the contract until money is available, either by appropriation or

by self liquidation (sale of the water), to pay the debt. The United States claims that it may sue to enforce the contract even in the absence of appropriations or water sales. There are practically no material factual issues in dispute with regards to the issues presented to the Court herein.

If the Court of Appeals ruling is not reversed, then the Oklahoma legislature may be forced to appropriate monies to pay the money judgment because there has been no liquidating sale of water storage rights to local interests. Non-payment would put the State in contempt of a federal court order. This would cause the legislature to have to appropriate funds and act in violation of its own Constitution or suffer being in contempt of the federal court.[2] States should be made aware that they cannot rely upon their debt limitation laws and that a forced appropriation of monies is a potential outcome of entering into a water storage contract with the United States in the event that the water storage rights cannot be sold.

The alternative, of course, is that the United States, if the Court of Appeals was in error, has a need to know that it cannot enforce a multi-year obligation against a State which incorporates a State's debt limitation, when there has been no appropriation by the State legislature or when there has been no self liquidation of the debt. In either event, guidance by this Court is necessary so that current

[2] While the Court of Appeals decision states that it does not require the legislature to appropriate funds because there are other avenues available to the state such as selling the water. This, however, is mere speculation on the part of the Court of Appeals that the water storage at issue can be sold. In the absence of a viable sale, the legislature would have no choice but to appropriate funds or suffer being in contempt of a federal order.

and future rights of the parties' to a water storage contract is known and accounted for when the parties enter into the contract. Without this guidance, States believing that their debt limitation laws will be honored in a water storage contract may face the same fate that Oklahoma currently faces: having a federal court judgment for millions of dollars issued against it when the State expected its debt limitation laws to control the contract's enforcement.

C. THE COURT OF APPEALS RULING WAS IN ERROR

Besides the fact that this Court has not spoken on this issue of national importance and this Court's guidance is needed, certiorari should be granted because the 10th Circuit Court of Appeals was in error. The appeals court held that federal law solely applies to the interpretation of the contract. The appeals court failed to consider that the contract wording (incorporating State debt limitation laws) is what would actually control. In fact, the appeals court never considered or discussed the incorporation of this wording in the contract.

Secondly, while the appeals court states that federal law controls, the appeals court never considered that the federal law is in Oklahoma's favor. An application of 42 U.S.C. §1962b-5b(a), a federal statute, incorporates State debt limitation laws. Therefore, even if federal law solely controlled the contract's interpretation, a proper application of the federal statute (the Flood Control Act) would have resulted in the same ruling as an interpretation solely under State law; to wit: the State's constitutional debt limitation does not permit the enforcement of the water storage agreement apart from an appropriation of funds by

the State Legislature to pay the obligation. The 10th Circuit Court of Appeals erred in its application of federal law.

CONCLUSION

This case presents a novel issue for this Court to determine the interplay between federal law and State law in a water storage contract. The issue is of national importance because many States have water storage contracts with the United States and have entered into these agreements in reliance of their own debt limitation laws. Therefore, this Court should grant certiorari to the 10th Circuit Court of Appeals and give some definitive guidance in the matter.

Respectfully submitted,

W.A. DREW EDMONDSON
Attorney General

SUSAN K. NOLAND, OBA #13453
Assistant Attorney General
OKLAHOMA ATTORNEY GENERAL'S OFFICE
Chief, Litigation Section
313 N. E. 21st Street
Oklahoma City, Oklahoma 73105
Tele: (405) 521-4274
Fax: (405) 521-4518
Susan_Noland@oag.state.ok.us

M. DANIEL WEITMAN, OBA #17412
Assistant Attorney General
OKLAHOMA ATTORNEY GENERAL'S OFFICE
313 N. E. 21st Street
Oklahoma City, Oklahoma 73105
Tele: (405) 521-4274
Fax: (405) 521-4518
Dan_Weitman@oag.state.ok.us

Index

Order and Judgment filed June 12, 2006.....App. 1

Order filed November 10, 2004.....App. 9

Order filed October 22, 2004.....App. 15

Petition for Rehearing denied filed July 31, 2006.....App. 19

Oklahoma Statute Annotated, Article X. Revenue and Taxation, § 23. Balanced budget-Procedures.....App. 20

United States Code Annotated, 43 U.S.C.A. §390b, Development of water supplies for domestic, municipal, industrial and other purposes.....App. 26

Complaint, filed July 14, 1998.....App. 30

Water Storage Contract as exhibit to complaint.....App. 41

Answer, filed August 10, 1998.....App. 67

184 Fed.Appx. 701

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STATE OF OKLAHOMA; OKLAHOMA WATER RESOURCES BOARD, Defendants-Appellants.	No. 05-5098 (D.C. No. 98-CV-521-E) (N.D. Okla.)

ORDER AND JUDGMENT*

(Filed June 12, 2006)

Before **PORFILIO**, **BALDOCK**, and **EBEL**, Circuit Judges.

The State of Oklahoma and the Oklahoma Water Resources Board (collectively "the Board") appeal from the

---

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

district court's decision granting summary judgment in favor of the United States on its breach of contract claim. On appeal, the Board argues that the district court erred in its decision because: (1) there are questions of fact as to whether the Board breached the contract; and (2) even if the money judgment against the Board were appropriate, it was error to grant an injunction against the Board. We review de novo the district court's grant of summary judgment in favor of the United States, applying the same standard as the district court. *See Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). We affirm.

I

In 1974, the United States, through the Army Corps of Engineers, entered into a contract with the Water Conservation Storage Commission of the State of Oklahoma, the legal predecessor to the Board, for the building of Clayton Lake (the name was later changed to Sardis Lake). The contract provided that the Corps would build the lake for the purpose of present and future use water supply storage. In return, the Board agreed to repay the Corps for building the lake in fifty consecutive annual payments and to pay future operating costs of the lake. The contract was approved by the Oklahoma Attorney General, Larry Derryberry.

The Board made six annual payments under the contract. After March of 1990, the Board made only two partial payments. The United States ultimately sued the Board for breach of contract. The parties filed cross-motions for summary judgment and the district court granted summary judgment in favor of the United States.

The district court's judgment included an award of money damages, declaratory relief and injunctive relief. This appeal followed.

II

The Board's main argument on appeal is that the district court erred because there are material questions of fact regarding whether the Board breached the water supply contract.[1] "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Miles v. Denver Public Sch.*, 944 F.2d 773, 775 (10th Cir. 1991). Although the Board concedes that the contract is valid, it argues that the contract is not enforceable under Oklahoma law until the legislature appropriates funds to pay the contract. The Board contends that it is authorized to sell its water storage rights and could use those proceeds to pay the United States, but the Board claims that the United States cannot sue for those funds until the Board actually sells those rights. The Board argues that because the United States has not shown either that the legislature has appropriated the funds to pay the debt, or that the Board has sold its water storage rights, the district court erred when it granted summary judgment in favor of the United States.

---

[1] The Board presents as separate issues the question of whether the district court erred in granting summary judgment in favor of the United States and in denying the Board's cross-motion for summary judgment. The arguments for these two issues are virtually identical; therefore, we will treat them as one issue on appeal.

The Board's assertion that the district court erred in granting summary judgment in favor of the United States is based on the erroneous premise that Oklahoma law controls the United States' contract claim. *In United States v. Indep. Sch. Dist. No. 1,* 209 F.2d 578, 580-81 (10th Cir. 1954), we determined that Oklahoma law did not limit the United States' ability to recover overpayments made to a subdivision of the State in conjunction with a valid contract for the establishment of a community lunch school program. Among other arguments based on Oklahoma law, the plaintiffs in *Independent School District No. 1* argued, like the Board does here, that the Oklahoma Constitution precluded the United States from recovering in the absence of a valid prior appropriation by the Oklahoma legislature. *Id.* at 580. Relying on *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943), we concluded that the right of the United States to recover the overpaid funds was controlled by federal law, not Oklahoma law. *Id.* We explained,

> The funds which the government seeks to recover were disbursed to a subdivision of the state under authority of federal law and in the exercise of a constitutional function. And they were paid under conditions and circumstances which raise a duty or an obligation to repay that which was mistakenly disbursed. In the performance of the constitutional function there is no express or implied disposition to subordinate correlative federal rights to state law, and no reason is suggested or apparent for conditioning the government's rights or remedies upon state law. Whether, therefore, the asserted remedy be for money had and received or restitution for unjust

> enrichment, the right to recover under controlling federal law is plain.

Id. at 580-81.

It is now well-settled that "the 'obligations to and rights of the United States under its contracts are governed exclusively by federal law.'" *United States v. City of Las Cruces,* 289 F.3d 1170, 1186 (10th Cir. 2002) (quoting *Boyle v. United Techs. Corp.,* 487 U.S. 500, 504 (1988)). Here, the contract itself was authorized by two federal laws, the Water Supply Act of 1958, 43 U.S.C. § 390b, and the Flood Control Act of 1962, 42 U.S.C. § 1962d-5b. The Water Supply Act recognizes that it is the states' primary responsibility to develop their own water supplies, but that the federal government should participate and cooperate in developing such supplies. *See* 43 U.S.C. § 390b(a). These laws provide that the state or non-federal interest must pay for the cost of any water resources project and must enter into a written contract reflecting such agreement. *See id.* at § 390b(b); 42 U.S.C. § 1962d-5b(a).

Consistent with these federal laws, when the Board entered into the contract, it agreed to the following statement: "[the Board] is empowered . . . to contract with the Government and is vested with all necessary powers for accomplishment of the purposes of this contract, including those required by Section 221 of the Flood Control Act of 1970 (42 USC 1962d-5b)." Aplt.App. at 18. In another part of the contract, the Attorney General certified that: "It is my opinion that this contract is within the authority of the contracting agency and in reaching this conclusion I have considered the effect of Section 221 of the Flood Control Act of 1970 (42 USC 1962d-5b)." *Id.* at 27. In addition to

the requirement of a written agreement, the Flood Control Act requires that the Board "be a legally constituted public body with full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform." 42 U.S.C. § 1962d-5b(b). The Flood Control Act also provides that, "every agreement entered into pursuant to this section shall be enforc[ea]ble in the appropriate district court of the United States." *Id.* § 1962d-5b(c).

Because federal law governs the United States' contract claim, the facts the Board asserts are in dispute – that the legislature has not made any appropriations and the Board has not sold any water storage rights – are not material. The material facts are undisputed. The Board admitted in its Answer that it entered into a water supply contract with the United States pursuant to the Water Supply Act of 1958 and Section 221 of the Flood Control Act of 1970 and that it was duly authorized to enter into the contract. The contract, which the Board admits is valid, requires the Board to make fifty consecutive annual payments. The Board admitted in its Answer that it has not made any payments under the contract since September 1997. Accordingly, the district court properly found that the contract is valid, the Board is legally required to perform its obligations under the contract, and the contract is enforceable in federal court. The district court therefore did not err in granting summary judgment in favor of the United States on its breach of contract claim.

III

In its second issue on appeal, the Board argues that, even if the contract is enforceable, the district court erred

in granting the United States' request for injunctive relief: (1) requiring the Board to make all future payments under the water supply contract within ninety days of receiving notice that a payment is due; and (2) prohibiting the Board from taking any other action that would result in a breach of the water supply contract. The district court's injunctive relief is essentially an order for the Board to specifically perform the contract, which we review for abuse of discretion. *See Koch v. Koch,* 903 F.2d 1333, 1335-36 (10th Cir. 1990). An abuse of discretion will be found only where the district court makes "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *FDIC v. Oldenburg,* 34 F.3d 1529, 1555 (10th Cir. 1994) (quotation omitted).

The Board argues that the district court is in effect requiring the legislature to appropriate monies to make the annual payment within ninety days of receipt of notice from the United States and that this is unlawful under *In the Matter of the Application of the Oklahoma Capitol Improvement Authority,* 958 P.2d 759 (Okla. 1998). The Board acknowledges, however, that it has the authority to acquire funds from at least one source other than legislative appropriations by selling its water storage rights. The district court's order therefore does not force the Oklahoma legislature to appropriate the funds. Moreover, the Board's argument that it will suffer hardship if it is required to make its future annual payments within ninety days of receiving notice that a payment is due is entirely speculative at this point, and is not a basis for finding that the district court abused its discretion in granting relief. *See In re Carpenter,* 205 F.3d 1249, 1252 n. 2 (10th Cir. 2000) (rejecting argument that specific performance would frustrate purpose of decree or make it

inequitable as speculative; in the event decree became inequitable in the future, the party could seek relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)).

The judgment of the district court is AFFIRMED.

Entered for the Court

John C. Porfilio
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case No. 98-C-521-E
THE STATE OF OKLAHOMA AND OKLAHOMA WATER RESOURCES BOARD,	)	
Defendants.	)	

ORDER

(Filed Nov. 10, 2004)

Now before the Court is Plaintiff's Memorandum of Law Pursuant to the Order of the Court Dated October 22, 2004, and Defendant's Supplemental Brief In Support of Defendants' Response to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment and Brief In Support."

In this matter, the United States seeks to establish the liability of the State and the Board to carry out their obligations pursuant to a water supply storage contract (DAC W56-74-0134) (the Contract). The United States contends that the contract is valid and binding on the state and the Board, and that they are estopped from claiming otherwise. The State and the Board contend that the state did not create any contractual "debt" to Plaintiff in the Contract at issue and that, in absence of creating a debt, the contract is unenforcebable [sic]. The State and the Board also contend that because the legislature has not appropriated funding for payments under

the Contract, there can be no claim for past due or future payments. In its previous Order, the Court denied Motions for Summary Judgment, and ordered supplemental briefing on the Constitutionality of the Contract. In the Supplemental Briefs, the parties clarified their positions, making it clear that both sides agree that the contract is a valid contract, and does not offend the Oklahoma Constitution and does not create any "unconstitutional" debt. The State argues instead that the United States cannot enforce the contract because no debt is created.

Undisputed Facts

A Federal water resource project, the Clayton Lake Project was authorized by the Flood Control Act of 1962, Public Law 87-874, 87th Congress, to be constructed in the State of Oklahoma. The federal project name was changed from Clayton Lake to Sardis Lake by public Law 97088, approved December 4, 1981. One of the primary purposes of the Sardis Lake Project was water supply storage. In accordance with the provisions of the Water Supply Act of 1958 and 42 U.S.C. 1962d-5b, the United States entered into the Contract, dated April 9, 1974, with the Board's legal predecessor, the Water Conservation Storage Commission of the State of Oklahoma, acting on behalf of the State of Oklahoma for the water supply storage space in Sardis Lake.

The Defendants, in order to induce the United States to construct the Sardis Lake Project, were required to give specific statutorily required assurances to satisfy both the Water Supply Act of 1958, 43 U.S.C. §390b-f and §221 of the Flood Control Act of 1970, 42 U.S.C. § 1962d-5b. These assurances are specifically set forth in the Contract.

Without those assurances, the United States Army Corps of Engineers would not lawfully have been able to construct the Sardis Lake Project under federal law. In the Contract, the Attorney General of Oklahoma, Larry Derryberry, specifically certified, as Section 221 of the Flood Control Act of 1970 requires, that the Contract was "within the authority of the contracting agency and in reaching this conclusion I have considered the effect of Section 221 of the Flood Control Act of 1970 (42U.S.C. 1962d-5b)."

The Contract contemplated payment for the right to use water storage space, and Plaintiff seeks not only past due payments, but also accelerated future payment under the contract.

Analysis

This Court previously denied summary judgment in favor of the Plaintiff and directed the parties to address the validity of the Contract in light of the Oklahoma Constitution. In their supplemental briefs, both sides made it clear that there is no contention that the contract is not valid and that it does not offend the Oklahoma Constitution in that it does not create any unconstitutional debt. The position of the Defendant is that the Contract is valid, it simply is not enforceable because the state legislature cannot be required to appropriate monies for the repayment of the costs. In taking this position, Defendants rely on *Application of Oklahoma Capitol Improvement Authority*, 958 P.2d 759 (1998) and *Fent v. Oklahoma Capitol Improvement Authority*, 1999 OK 64, 984 P.2d 200 (1999), cases in which the Oklahoma Supreme Court held that bonds issued by the Oklahoma

Capitol Improvement Authority pursuant to statute were not "debts", because the statute did not bind future Legislatures to make annual appropriations and the full faith and credit of the State was not pledged. The Court in these two cases explained that, at most the bonds created a moral obligation and not a legal obligation.

The Court finds that these cases are not dispositive nor helpful to the analysis in this case because they are dealing with bonds created by statute and not a contract. The Court rejects the notion that a legally binding contract, certified by the Attorney General of the State as "within the authority of the contracting agency", could create a "moral obligation" rather than a legal one. Moreover in light of the admission of the Defendants that there is no claim that the contract is unconstitutional, the decision in *State ex rel. Fent v. State ex. rel Oklahoma Water Resources Board,* 66 P.3d 432 (Okla. 2003) is persuasive. The *Fent* Court held that public officials have a duty to follow an Attorney General opinion until they are judicially relieved of compliance. Thus, the contract is valid, and the State must fulfill their obligation under the contract.

With this said, the question becomes one of the nature of the legal obligation created by the contract. Here it is important to note that the United States is not seeking an Order requiring the Legislature to appropriate funds for payment of the contract, but asserts that the contract can and should be enforced "through other means." Defendants fail to address this position, giving no reason that the contract cannot be enforced other than by legislative appropriation of funds. Certainly Defendants provide no compelling reason why the contract should be interpreted as creating a "moral debt" instead of being interpreted as

being enforeceable [sic] other that through the legislative appropriation of funds.

It is therefore clear that the contract does not create a "debt" under the Oklahoma Constitution, the contract is valid because the State of Oklahoma and the Oklahoma Water Resources Board had the authority to enter into the contract, the Defendants are legally required to perform their obligations under the contract, and the contract is enforeceable [sic] in this Court.

The Motion for Summary Judgment (dkt #27) of the Plaintiff, United States of America is GRANTED. The Cross Motion for Summary Judgment (dkt #31) of the Defendants, State of Oklahoma and Oklahoma Water Resources Board is DENIED.

/s/ James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case No. 98-CV-521-E
THE STATE OF OKLAHOMA AND OKLAHOMA WATER RESOURCES BOARD,	)	
Defendants.	)	

JUDGMENT

(Filed Nov. 10, 2004)

This matter came before the Court upon the Motion for Summary Judgment of the Plaintiff, United States of America, and the Cross Motion for Summary Judgment of the Defendants, State of Oklahoma and the Oklahoma Water Resources Board. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered in accord with the order filed this date Granting the Motion for Summary Judgment of the United States of America, and Denying the Cross Motion for Summary Judgment of the State of Oklahoma and the Oklahoma Water Resources Board, for Plaintiff and against Defendants..

/s/ James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	) Case No. 98-C-521-E
THE STATE OF OKLAHOMA AND OKLAHOMA WATER RESOURCES BOARD, Defendants.	)

ORDER

(Filed Oct. 22, 2004)

Now before the Court is the Motion for Summary Judgment (dkt # 27) of the Plaintiff, United States of America, and the Cross-Motion for Summary Judgment (dkt # 31) of the Defendants, State of Oklahoma (the State) and Oklahoma Water Resources Board (the Board).

In this matter, the United States seeks to establish the liability of the State and the Board to carry out their obligations pursuant to a water supply storage contract (DACW56-74-0134) (the Contract). The United States contends that the contract is valid and binding on the state and the Board, and that they are estopped from claiming otherwise. The State and the Board contend that the state did not create any contractual "debt" to Plaintiff in the Contract at issue and that if it had, entering into the Contract would be unconstitutional. The State and the Board also contend that because the legislature has not appropriated funding for payments under the Contract, there can be no claim for past due or future payments.

Undisputed Facts

A Federal water resource project, the Clayton Lake Project was authorized by the Flood Control Act of 1962, Public Law 87-874, 87th Congress, to be constructed in the State of Oklahoma. The federal project name was changed from Clayton Lake to Sardis Lake by public Law 97088, approved December 4, 1981. One of the primary purposes of the Sardis Lake Project was water supply storage. In accordance with the provisions of the Water Supply Act of 1958 and 42 U.S.C. 1962d-5b, the United States entered into the Contract, dated April 9, 1974, with the Board's legal predecessor, the Water Conservation Storage Commission of the State of Oklahoma, acting on behalf of the State of Oklahoma for the water supply storage space in Sardis Lake.

The Defendants, in order to induce the United States to construct the Sardis Lake Project, were required to give specific statutorily required assurances to satisfy both the Water Supply Act of 1958, 43 U.S.C. §390b-f and §221 of the Flood Control Act of 1970, 42 U.S.C. § 1962d-5b. These assurances are specifically set forth in the Contract. Without those assurances, the United States Army Corps of Engineers would not lawfully have been able to construct the Sardis Lake Project under federal law. In the Contract, the Attorney General of Oklahoma, Larry Derryberry, specifically certified, as Section 221 of the Flood Control Act of 1970 requires, that the Contract was "within the authority of the contracting agency and in reaching this conclusion I have considered the effect of Section 221 of the Flood Control Act of 1970 (42U.S.C. 1962d-5b)."

The Contract contemplated payment for the right to use water storage space, and Plaintiff seeks not only past due payments, but also accelerated future payment under the contract.

Plaintiffs base their argument on the certification of the Attorney General, as well as the opinion in *State ex rel. Fent v. State ex rel. Oklahoma Water Resources Board*, 66 P.3d 432 (Okla. 2003). In that related case, the Court declined to decide the question of the constitutionality of the Contract, holding that state officials could not be held liable for making payments under the Contract, regardless of the constitutionality of the Contract, because they acted in conformity with the opinion of the Attorney General that the contract was lawful. The *Fent* Court held that public officials have a duty to follow an Attorney General opinion until they are judicially relieved of compliance. The *Fent* decision does not help here. The state, through its cross motion for summary judgment is seeking a judicial determination that the contract is either unconstitutional or does not create any debt. Thus, unlike in the *Fent* case, the constitutionality of the contract must be directly addressed.

Accordingly, the Motion for Summary Judgment (dkt # 27) of the Plaintiff, United States of America is DENIED. The parties are directed to submit additional briefing, specifically addressing the validity of the Contract in light of the Oklahoma Constitution, and whether the Contract can, and does, create an obligation to pay other than through the taxing power of the state. Briefs are due on or before November 10, 2004.

IT IS SO ORDERED THIS 22nd DAY OF OCTOBER, 2004.

/s/ James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STATE OF OKLAHOMA; OKLAHOMA WATER RESOURCES BOARD, Defendants-Appellants.	No. 05-5098 (D.C. No. 98-CV-521-E) (N.D. Okla.)

ORDER

Filed July 31, 2006

Before **PORFILIO**, **BALDOCK**, and **EBEL**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
ELISABETH A. SHUMAKER, CLERK

By: [Illegible]
Deputy Clerk

Const. Art. 10, § 23

§ 23. Balanced budget – Procedures

The state shall never create or authorize the creation of any debt or obligation, or fund or pay any deficit, against the state, or any department, institution or agency thereof, regardless of its form or the source of money from which it is to be paid, except as may be provided in this section and in Sections 24 and 25 of Article X of the Constitution of the State of Oklahoma.

To ensure a balanced annual budget, pursuant to the limitations contained in the foregoing, procedures are herewith established as follows:

1. Not more than forty-five (45) days or less than thirty-five (35) days prior to the convening of each regular session of the Legislature, the State Board of Equalization shall certify the total amount of revenue which accrued during the last preceding fiscal year to the General Revenue Fund and to each Special Revenue Fund appropriated directly by the Legislature, and shall further certify amounts available for appropriation which shall be based on a determination, in accordance with the procedure hereinafter provided, of the revenues to be received by the state under the laws in effect at the time such determination is made, for the next ensuing fiscal year, showing separately the revenues to accrue to the credit of each such fund of the state appropriated directly by the Legislature.

Amounts certified as available for appropriation from each fund, as hereinbefore provided, shall be ninety-five percent (95%) of an itemized estimate made by the State Board of Equalization, which shall include all sources of revenue to each fund for the next ensuing fiscal year;

provided, however, appropriated federal funds shall be certified for the full amount of the estimate. Said estimate shall consider any increase or decline in revenues that would result from predictable changes in the economy.

Legislative appropriations for any fiscal year, except for special appropriations provided for in paragraph 6, 7 or 8 shall be limited to a sum not to exceed the total amount appropriated from all funds in the preceding fiscal year, plus twelve percent (12%), adjusted for inflation for the previous calendar year. Said limit shall be adjusted for funds not previously appropriated. The limit on the growth of appropriations shall be certified to by the State Board of Equalization.

2. Such certification shall be filed with the Governor, the President and President Pro Tempore of the Senate, and the Speaker of the House of Representatives. The Legislature shall not pass or enact any bill, act or measure making an appropriation of money for any purpose until such certification is made and filed, unless the State Board of Equalization has failed to file said certification at the time of convening of said Legislature. In such event, it shall be the duty of the Legislature to make such certification pursuant to the provisions of this section. All appropriations made in excess of such certification shall be null and void; provided, however, that the Legislature may at any regular session or special session, called for that purpose, enact laws to provide for additional revenues or a reduction in revenues, other than ad valorem taxes, or transferring the existing revenues or unappropriated cash on hand from one fund to another, or making provisions for appropriating funds not previously appropriated directly by the Legislature. Whereupon, it shall be the duty of the State Board of Equalization to make a determination of

the revenues that will accrue under such laws and ninety-five percent (95%) of the amount of any increase or decrease resulting, for any reason, from such changes in laws shall be added to or deducted from the amount previously certified available for appropriation from each respective fund, as the case may be. The State Board of Equalization shall file the amount of such adjusted certification, or additional certification for funds not previously appropriated directly by the Legislature, with the Governor, with the President and President Pro Tempore of the Senate, and the Speaker of the House of Representatives, and such adjusted amount shall be the maximum amount which can be appropriated for all purposes from any such fund for the fiscal year being certified.

3. The State Board of Equalization shall meet within five (5) days after the monthly apportionment in February of each year, and at that time may adjust the certification, based upon the most current information available, and determine the amount of funds available for appropriation for that legislative session. At said meeting the Board shall determine the limit on the growth of appropriations as provided for in this section.

4. Surplus funds or monies shall be any amount accruing to the General Revenue Fund of the State of Oklahoma over and above the itemized estimate made by the State Board of Equalization.

5. Beginning July 1, 1985, all such surplus funds or monies accruing after said date shall be placed in a Constitutional Reserve Fund by the State Treasurer until such time that the amount of said Fund equals ten percent (10%) of the General Revenue Fund certification for the

preceding fiscal year. Appropriations made from said Fund shall be considered special appropriations.

6. Up to three-eighths (3/8) of the balance at the beginning of the current fiscal year in the Constitutional Reserve Fund may be appropriated for the forthcoming fiscal year, when the certification by the State Board of Equalization for said forthcoming fiscal year General Revenue Fund is less than that of the current fiscal year certification. In no event shall the amount of monies appropriated from the Constitutional Reserve Fund be in excess of the difference between the two said certifications.

7. Up to three-eighths (3/8) of the balance at the beginning of the current fiscal year in the Constitutional Reserve Fund may be appropriated for the current fiscal year if the State Board of Equalization determines that a revenue failure has occurred with respect to the General Revenue Fund of the State Treasury. In no event shall the amount of monies appropriated from the Constitutional Reserve Fund pursuant to this paragraph be in excess of the amount of the projected revenue failure in the General Revenue Fund, which total amount shall be computed by the State Board of Equalization, for the entire fiscal year. Monies appropriated to any state governmental entity from the Constitutional Reserve Fund pursuant to this paragraph may only be made in order to ensure that the monies actually received by the entity for the then current fiscal year are equal to or less than, but not in excess of, the total appropriation amount for such entity in effect at the beginning of the then current fiscal year.

8. Up to one-quarter (1/4) of the balance at the beginning of the current fiscal year in the Constitutional Reserve Fund may be appropriated, upon a declaration by

the Governor that emergency conditions exist, with concurrence of the Legislature by a two-thirds (⅔) vote of the House of Representatives and Senate for the appropriation; or said one-quarter (¼) could be appropriated upon a joint declaration of emergency conditions by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, with a concurrence of a three-fourths (¾) vote of the House of Representatives and Senate.

9. That portion of every appropriation, at the end of each fiscal year, in excess of actual revenues collected and allocated thereto, as hereinafter provided, shall be null and void. Revenues deposited in the State Treasury to the credit of the General Revenue Fund or of any special fund (which derives its revenue in whole or in part from state taxes or fees) shall, except as to principal and interest on the public debt, be allocated monthly to each department, institution, board, commission or special appropriation on a percentage basis, in that ratio that the total appropriation for such department, institution, board, commission or special appropriation from each fund for that fiscal year bears to the total of all appropriations from each fund for that fiscal year, and no warrant shall be issued in excess of said allocation. Any department, institution or agency of the state operating on revenues derived from any law or laws which allocate the revenues thereof to such department, institution or agency shall not incur obligations in excess of the unencumbered balance of cash on hand. Nothing in this section shall prevent, under such conditions and limitations as shall be prescribed by law, the governing board of an institution of higher education within The Oklahoma State System of Higher Education from contracting with a president of such institution of

higher education for periods extending more than one (1) year, but not to exceed three (3) years beyond the fiscal year in which the contract is signed.

10. The Legislature shall provide a method whereby appropriations shall be divided and set up on a monthly, quarterly or semiannual basis within each fiscal year to prevent obligations being incurred in excess of the revenue to be collected, and notwithstanding other provisions of this Constitution, the Legislature shall provide that all appropriations shall be reduced to bring them within revenues actually collected, but all such reductions shall apply to each department, institution, board, commission or special appropriation made by the State Legislature in the ratio that its total appropriation for that fiscal year bears to the total of all appropriations from that fund for that fiscal year; provided, however, that the Governor may in his discretion issue deficiency certificates to the State Treasurer for the benefit of any department, institution or agency of the state, if the amount of such deficiency certificates be within the limit of the current appropriation for that department, institution or agency, whereupon the State Treasurer shall issue warrants to the extent of such certificates for the payment of such claims as may be authorized by the Governor, and such warrants shall become a part of the public debt and shall be paid out of any money appropriated by the Legislature and made lawfully available therefor; provided further, that in no event shall said deficiency certificates exceed in the aggregate the sum of Five Hundred Thousand Dollars ($500,000.00) in any fiscal year.

43 U.S.C.A. § 390b. Development of water supplies for domestic, municipal, industrial, and other purposes

(a) Declaration of policy

It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

(b) Storage in reservoir projects; agreements for payment of cost of construction or modification of projects

In carrying out the policy set forth in this section, it is provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: *Provided*, That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: *Provided further*, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in

accordance with the provisions of this section: *And provided further*, That (1) for Corps of Engineers projects, not to exceed 30 percent of the total estimated cost of any project may be allocated to anticipated future demands, and, (2) for Bureau of Reclamation projects, not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project: *And provided further*, That for Corps of Engineers projects, the Secretary of the Army may permit the full non-Federal contribution to be made, without interest, during construction of the project, or, with interest, over a period of not more than thirty years from the date of completion, with repayment contracts providing for recalculation of the interest rate at, five-year intervals, and for Bureau of Reclamation projects, the entire amount of the construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply until such supply is first used, and (2) no interest shall be charged on such cost until such supply is first used, but in no case shall the interest-free period exceed ten years. For Corps of Engineers projects, all annual operation, maintenance, and replacement costs for municipal and industrial water supply storage under the provisions of this section shall be reimbursed from State or local interests on an annual basis. For Corps of Engineers projects, any repayment by a State or local interest shall be made with interest

at a rate to be determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the reimbursement period, during the month preceding the fiscal year in which costs for the construction of the project are first incurred (or, when a recalculation is made), plus a premium of one-eighth of one percentage point for transaction costs. For Bureau of Reclamation projects, the interest rate used for purposes of computing interest during construction and interest on the unpaid balance shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is initiated, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations, which are neither due nor callable for redemption for fifteen years from date of issue. The provisions of this subsection insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Projects Act of 1939 (53 Stat. 1187) [43 U.S.C.A. § 485 et seq.] relating to the same subject.

(c) Application to other laws

The provisions of this section shall not be construed to modify the provisions of section 701-1 of Title 33 and section 390 of this title, as amended and extended, or the provisions of sections 372 and 383 of this title.

(d) Approval of Congress of modifications of reservoir projects

Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would

seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF OKLAHOMA and OKLAHOMA WATER RESOURCES BOARD, Defendants.	)	Civil Action No. 98CV521 K (E)

COMPLAINT

(Filed Jul. 14, 1998)

The United States, by its undersigned attorneys, by the authority of the Attorney General of the United States, alleges as follows:

NATURE OF ACTION

1. This is a civil action to enforce a Water Supply Contract entered into by Plaintiff and Defendants pursuant to the Water Supply Act of 1958, as amended, 43 U.S.C. §§ 390b-390f, and Section 221 of the Flood Control Act of 1970, 42 U.S.C. § 1962d-5b.

2. This court has jurisdiction over the subject matter of. the action pursuant to 28 U.S.C. § 1345 as one involving a claim by the United States arising under the laws of the United States.

VENUE

3. Venue is proper in the Northern District of Oklahoma as a substantial part of the acts and omissions giving rise to the claims of the United States occurred herein.

PARTIES

4. Plaintiff, United States of America, brings this action on behalf of the Secretary of the Army and the United States Army Corps of Engineers.

5. Defendant, the State of Oklahoma, is a state of the United States, and is duly authorized to enter into the Water Supply Contract which is the subject of this action, and to perform all its duties and obligations under such Water Supply Contract.

6. Defendant, Oklahoma Water Resources Board, is a body corporate and politic and an instrumentality, agency, and department of the State of Oklahoma created pursuant to Oklahoma State law; and is duly authorized to carry out the terms of the Water Supply Contract which is the subject of this action, and to perform all its obligations and duties pursuant to such Water Supply Contract.

7. Defendant, Oklahoma Water Resources Board, is the legal successor in interest to and has assumed the liabilities of the Water Conservation Storage Commission of the State of Oklahoma, the original signatory to the Water Supply Contract (DACW56-74-C-0134) with the United States Army Corps of Engineers, dated April 9, 1974. The Water Conservation Storage Commission of the State of Oklahoma was a body corporate and politic and an instrumentality, agency and department of the State of

Oklahoma created pursuant to Oklahoma State Law; and was duly authorized to carry out the terms of the Water Supply Contract which is the subject of this action, and to perform all its obligations and duties pursuant to such Water Supply Contract.

GENERAL ALLEGATIONS

8. A Federal water resource project, the Clayton Lake Project, was authorized by the Flood Control Act of 1962, Pub. Law 87-874, 87th Congress, to be constructed in the State of Oklahoma. The project name was changed from Clayton Lake to Sardis Lake by Public Law 97-88, approved December 4, 1981. Public Law 99-88, approved August 15, 1985, authorized access road improvements. Public Law 98-63, approved July 30, 1983, authorized an intake structure.

9. One of the primary purposes of the Sardis Lake Project was water supply storage, and the Plaintiff and Defendants entered into a binding Water Supply Contract for this purpose.

WATER SUPPLY

10. Pursuant to the Water Supply Act of 1958, it is "the policy of Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial and other purposes and that the Federal government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance and operation" of projects such as the Sardis Lake Project. 43 U.S.C. § 390b(a).

11. The Water Supply Act of 1958 provides that State or local interests shall agree before construction of a Federal water supply project to pay for the costs of the water supply storage provisions of such a project, 43 U.S.C. §390b(b), and be responsible for payment for all replacement, operation and maintenance costs allocated to water supply, 43 U.S.C. §390e.

12. The Flood Control Act of 1970 provides that the construction of any water resources project may not be commenced until each non-Federal interest has entered into a written Water Supply Contract with the Secretary of the Army to furnish its required cooperation. 42 U.S.C. §1962d-5b(b) defines "non-Federal interest" as "a legally constituted public body with full authority and capability to perform the terms of its Water Supply Contract and to pay damages, if necessary, in the event of failure to perform."

13. 42 U.S.C. §1962d-5b(c) further provides that "every Agreement entered into pursuant to this section shall be enforceable in the appropriate district court of the United States."

14. In accordance with the provisions of the Water Supply Act of 1958 and the Flood Control Act of 1970, the United States entered into a Water Supply Contract (DACW56-74-C-0134), dated April 9, 1974, with Defendant Oklahoma Water Resources Board's legal predecessor, the Water Conservation Storage Commission of the State of Oklahoma, acting on behalf of the State of Oklahoma, for water supply storage space in Sardis (formerly Clayton) Lake. The Oklahoma Water Resources Board is the legal successor to and has assumed the liabilities of the Water Conservation Storage Commission

of the State of Oklahoma. A copy of this Water Supply Contract is attached hereto as Exhibit 1.

15. Pursuant to Article 1 of the Water Supply Contract, the United States designed and constructed the Sardis Lake Project so as to include therein space for the storage of a water supply for Defendants, and Defendants were given the right to utilize specified water storage space in the Project and withdraw or order releases from Sardis Lake.

16. In consideration of the right to utilize such water storage space, Article 5 of the Water Supply Contract provides for payments to be made annually by defendants to the United States for the following: Project investment costs, major capital replacement costs, annual operation and maintenance costs, and, if necessary, delinquent payment charges.

17. Article 6 of the Water Supply Contract provides that construction cost dollar amounts set forth in the Water Supply Contract and exhibits thereto are "tentative only, based on the Government's best estimates." They are to be adjusted upward or downward when final construction costs become known.

18. Defendants were notified by the United States that on January 6, 1983 the Project was operational for water supply purposes, and that under the terms of the Water Supply Contract, Article 5, they were required to begin making annual payments under the Water Supply Contract (based on then estimated costs) within 30 days of such notification.

19. Defendants were late in making their first six annual payments under the agreement, and after 1990

made only two partial payments, leaving a past due amount as of the present date in excess of $6.3 Million. Plaintiff has made repeated demands upon the defendants for payment of the amounts due under the contract but without success. Such failure to make the payments due under the contact constitutes a breach of the contract and a violation of the obligations the defendants assumed under the Water Supply Act of 1958 and § 221 of the 1970 Flood Control Act.

20. As a result of the breach of the Water Supply Contract, the Corps by letter dated April 19, 1996, demanded payment by May 20, 1996 of all amounts due and owing under the Water Supply Agreement, advising defendants that the failure to make all payments due under the terms of the demand would result in their being declared in default and subject to appropriate enforcement action.

21. Plaintiff had meetings with the Defendants and verbal discussions regarding the demanded repayment, but no payment was made.

22. The Government notified defendants by letter dated May 21, 1996 that they were in default of their obligations under the Water Supply Contract.

23. On September 30, 1996 a Memorandum of Understanding ("MOU") was signed with OWRB which deferred litigation until after May 30, 1997 to provide time for the Oklahoma Water Resources Board to make a good faith effort to arrange to repay the then $5 million arrearage. The Oklahoma Water Resources Board paid the United States $508,030.00. On April 30, 1997 the Governor of Oklahoma was notified by the United States Army Corps of Engineers that the MOU was signed to allow time

for the State to repay the arrearage and to begin making regular payments. The District Engineer said that the State would again be in default on May 30, 1997 unless arrangements were made to satisfy the arrearage and the right to use water would be suspended effective June 1, 1997. OWRB failed to make the payment due on June 1, 1997.

24. In July 1997, it was agreed that litigation over the breach would be withheld until July 1, 1998 so long as the State of Oklahoma and the Oklahoma Water Resources Board committed to seek funding, including, if necessary, seeking funds from the Constitutional Reserve Fund ("Rainy Day Fund") of the State of Oklahoma. In September 1997, the United States Army Corps of Engineers agreed to withdraw the default declaration until July 1, 1998.

25. The Oklahoma Water Resources Board paid the United States $1,175,850.00 in September 1997. However, no further payments have been made.

26. Defendants failed to comply with their commitment to obtain funding to bring their obligations under the contract up to date and accordingly, the District Engineer on July 2, 1998 again declared the contract in default.

FIRST CLAIM FOR RELIEF – BREACH OF CONTRACT

27. The allegations set forth in paragraphs 1 through 26, inclusive, are realleged and incorporated herein by reference.

28. Pursuant to the provisions of the Water Supply Contract, Defendants are obligated to make annual

payments as well as any delinquency due in accordance with Article 5 of the Water Supply Contract.

29. Plaintiff has duly performed all its duties and obligations pursuant to the Water Supply Contract, and is ready, willing and able to perform any and all future obligations pursuant to said Water Supply Contract.

30. Defendants have failed to comply with the terms of the Water Supply Contract regarding their obligations thereunder even though the Plaintiff has constructed the Sardis Lake Project with provisions for water supply and the Defendants have had the use of this project since the project became operational, without any accounting to the United States of such activities. As a result of this breach of the contract, Plaintiff has suffered injuries for which there is no adequate remedy at law thus entitling Plaintiff to injunctive relief directing Defendants to specifically perform the terms and conditions of the Water Supply Contract, including making all payments when due, and immediately paying to Plaintiff those sums that are currently due under the contract.

SECOND CLAIM FOR RELIEF – ESTOPPEL

31. Defendants in order to induce the United States to construct the Sardis Lake Project, gave statutorily required assurances to satisfy both the Water Supply Act of 1958, 43 U.S.C. §§390b-f, and §221 of the Flood Control Act of 1970, 42 U.S.C. §1962d-5b. Such assurances are specifically contained in the contract attached hereto. Further, in said contract, the Attorney General of Oklahoma specifically certified, as §221 requires, that such contract was "within the authority of the contracting agency and in reaching this conclusion I have considered the effect of Section 221 of the Flood Control Act of 1970

(42 U.S.C. 1962d-5b)." Without such assurances, the Corps would not have lawfully been able to construct the project under federal law. Thereafter, the Corps fully performed its obligations under the contract by constructing Sardis Lake Reservoir and tendered the water supply storage to defendants for their use and benefit. In light of the foregoing, the Defendants are estopped from denying their liability to Plaintiff, and thus may properly be enjoined by this court to carry out the obligations they assumed under the Water Supply Act of 1958, the Flood Control Act of 1970 and the Water Supply Contract.

32. As a result of Defendants' failure to comply with the assurances it gave to induce construction of the project, Plaintiff has suffered injury for which there is no adequate remedy at law, and is entitled to injunctive relief requiring defendants to carry out the obligations set forth in the contract attached hereto.

RELIEF REQUESTED

Plaintiff prays for judgment against the Defendants, jointly and severally, granting the following relief:

1. A declaratory judgment setting forth the duties and obligations of Defendants pursuant to the Water Supply Contract, including but not limited to a requirement in the future to timely make payment of all monetary obligations of Defendants under such Water Supply Contract.

2. Injunctive relief directing Defendants to specifically perform all terms and conditions of the Water Supply Contract.

3. Injunctive relief estopping Defendants from claiming that they are not liable to Plaintiff pursuant to the Water Supply Act of 1958.

4. Judgment for all costs incurred by the United States in bringing this action.

5. Such other and further relief as the Court may deem proper and just.

DATED: July 14, 1998

Respectfully submitted,

/s/ [Illegible]
Lois J. Schiffer
Assistant Attorney General
Environment and Natural
Resources Division

/s/ Fred R. Disheroon
FRED R. DISHEROON
Special Litigation Counsel
United States Department of
Justice Environmental and
Natural Resources Division
P.O. Box 7397
Benjamin Franklin Station
Washington, D.C. 20044-7397
(202) 616-9649
Fax (202) 616-9667

CLAIRE E. DOUTHIT
Trial Attorney
General Litigation Section
United States Department of
Justice Environment and
Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0246
Fax (202) 305-0274

STEPHEN C. LEWIS
United States Attorney
Northern District of Oklahoma

/s/ Phil Pinnell
PHIL PINNELL, OBA#7169
Assistant United States Attorney
Northern District of Oklahoma
333 West Fourth St., Suite 3460
U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Attorneys for Plaintiff
United States of America

OF COUNSEL:

John Roselle, Jr.
Kay Hoover, OBA#10343
U.S. Army Corps of Engineers
1645 S. 101st E. Ave.
Tulsa, OK 74128
or:
P.O. Box 61
Tulsa, OK 74121-0061
(918) 669-7178
Fax (918) 669-7576

EXHIBIT 1

CONTRACT BETWEEN THE
UNITED STATES OF AMERICA

AND

THE WATER CONSERVATION STORAGE COMMISSION

OF

THE STATE OF OKLAHOMA

FOR

WATER STORAGE SPACE IN CLAYTON LAKE

THIS CONTRACT, entered into this 16 day of FEB, 1974, by and between THE UNITED STATES OF AMERICA (hereinafter called the "Government") represented by the Contracting Officer executing this contract, and THE WATER CONSERVATION STORAGE COMMISSION OF THE STATE OF OKLAHOMA (hereinafter called the "User");

WITNESSETH THAT:

WHEREAS, the Flood Control Act of 1962 (Public Law 87-874, 87th Congress), authorized the construction, operation, and maintenance of the Clayton Lake on Kiamichi River, Oklahoma, (hereinafter called the "Project"); and

WHEREAS, the User desires to contract with the Government for the use of storage included in the Project for municipal and industrial water supply, and for payment of the cost there of in accordance with the provisions of the Water Supply Act of 1958, as amended (43 USC 390b-f); and

WHEREAS, the User is empowered so to contract with the Government and is vested with all necessary powers for accomplishment of the purposes of this contract, including those required by Section 221 of the Flood Control Act of 1970 (42 USC 1962d-5b);

NOW, THEREFORE, the Government and the User agree as follows:

ARTICLE 1 – Water Storage Space.

(a) Project Construction. The Government, subject to the directions of Federal law and any limitations imposed thereby, shall design and construct the Project so as to include therein space for the storage of water by the User.

(b) Rights of User.

(1) The User shall have the right to utilize an undivided 100 percent (estimated to contain 297,200 acre-feet after adjustment for sediment deposits) of the total storage space in the Project between elevations 599.0 feet above mean sea level and 542.0 feet above mean sea level, which total storage space is estimated to contain 297,200 acre-feet after adjustment for sediment deposits. This storage space is to be used to impound water for present and anticipated future demand or need for municipal and industrial water supply. 47.678 percent (an estimated 141,700 acre-feet) of the space which User has a right to utilize is for present use water storage and 52.322 percent (an estimated 155,500 acre-feet) is for future use water storage.

2. The User shall have the right to withdraw water from the lake, or to order releases to be made by the Government through the outlet works, in the Dam, subject to the provisions of Article 1(c) and to the extent the

aforesaid storage space will provide; and shall have the right to construct all such works, plants, pipelines, and appliances as may be necessary and convenient for the purpose or diversion or withdrawals, subject to the approval of the Contracting Officer as to design and location. The grant of an easement for right-of-way, across, in and upon land of the Government at the Project shall be by a separate instrument in a form satisfactory to the Secretary of the Army, without additional cost to the User, under the authority of and in accordance with the provisions of 10 USC 2669. Subject to the conditions of such easement, the User shall have the right to use so much of the Project land as may reasonably be required in the exercise of the rights and privileges herein granted.

(c) Rights Reserved. The Government reserves the right to maintain at all times a minimum downstream release of 4 cubic feet per second through the gates or spillway of the dam. The Government further reserves the right to take such measures as may be necessary in the operation of the Project to preserve life or property, including the right not to make downstream releases during such periods of time as is deemed necessary in its sole discretion, to inspect, maintain, or repair the Project.

(d) Quality or Availability of Water. The User recognizes that this contract provides storage space for raw water only. The Government makes no representations with respect to the quality or availability of water and assumes no responsibility therefor, or for the treatment of the water.

ARTICLE 2 - Regulation of and Right to Use of Water. The regulation of the use of water withdrawn or released from the aforesaid storage space shall be the sole

responsibility of the User. The User has the full responsibility to acquire in accordance with state laws and regulations, and, if necessary, to establish or defend, any and all water rights needed for utilization of the storage provided under this contract. The Government shall not be responsible for diversions by others, nor will it become a party to any controversies involving the use of the storage space by the User except as such controversies may affect the operations of the Government.

ARTICLE 3 – Operation and Maintenance. The Government shall operate and maintain the Project and the User shall pay to the Government a share of the costs of such operation and maintenance as provided in Article 5. The User shall be responsible for operation and maintenance of all installations and facilities which it may construct for the diversion or withdrawal of water, and shall bear all costs of construction, operation and maintenance of such installations and facilities.

ARTICLE 4 – Measurement of Withdrawal and Releases. The User agrees to furnish and install, without cost of the Government, suitable meters or measuring devices satisfactory to the Contracting Officer for the measurement of water which is withdrawn from the Project by any means other than through the Project outlet works. The User shall furnish to the Government monthly statements of all such withdrawals. Releases from the water supply storage space through the Project outlet works shall be made in accordance with written schedules furnished by the User and approved by the Contracting Officer and shall be subject to Article 1(c). The measure of all such releases shall be by means of a rating curve of the outlet works, or by such other suitable means as may be agreed upon prior to use of the water supply storage space.

ARTICLE 5 – Payments. In consideration of the right to utilize the aforesaid storage space in the Project for municipal and industrial water supply purposes, the User shall pay the following sums to the Government:

(a) Project Investment Costs.

(1) The User shall repay to the Government, at the times and with interest on the unpaid balance as hereinafter specified, which, as shown in Exhibit "A" attached to and made a part of this contract, constitute the entire estimated amount of the construction costs, including interest during construction, allocated to the water storage right acquired by the User under this contract. The interest rate to be used for purposes of computing interest during construction and interest on the unpaid balance will be determined by the Secretary of the Treasury as of the beginning of the fiscal year in which construction of the Project is initiated, on the basis set forth in the Water Supply Act of 1958, as amended. Such interest rate at the time of negotiation of this contract is 4.012 percent. The User shall repay:

100 percent of the construction cost of specific water supply facilities, estimated at	$ 103,000
66.22 percent of the total Project joint-use construction costs, estimated at	15,078,000
Interest during construction, estimated at	1,218,000
Total estimated amount of Project investment costs allocated to water supply	$16,399,000

(2) The Project investment costs allocated to the storage space indicated in Article 1(b)(1) as being provided

for present demand is currently estimated at $7,877,000, on the basis of the cost presented in Exhibit "A". The amount of the Project investment costs allocated to the storage for present demand shall be paid in 50 consecutive annual installments, the first of which shall be due and payable within 30 days after the User is notified by the Contracting Officer that the Project is completed and operational for water supply purposes. Annual installments thereafter will be due and payable on the anniversary date of the first payment. Except for the first payment which will be applied solely to the retirement of principal, all installments shall include accrued interest on the unpaid balance at the rate provided above. The last annual installment shall be adjusted upward or downward when due to assure repayment of all of the investment costs allocated to the storage for present demand within 50 years.

(3) The amount of the Project investment costs allocated to the remaining portion of the storage space, that provided for future use, is currently estimated at $8,522,000 on the basis of the costs presented in Exhibit "A". No principal or interest payment with respect to this storage for future water supply is required to be made during the first 10 years following the date the Project is operational for water supply purposes, unless all or a portion of such storage is used during this period. The amount to be paid for any portion of such storage which is used shall be determined by multiplying the percentage of the total storage for future water supply which is placed in use by the total amount of the Project investment costs allocated to future water supply. Interest at the rate provided above will be charged on the amount of the Project investment costs allocated to the storage for future

water supply which is not being used from the tenth (10th) year following the date the Project is operational for water supply purposes until the time when such storage is first used. The User may at its option pay the interest as it becomes due or allow the interest to accumulate until the storage is used. If the latter option is exercised, the interest will be compounded annually and added to the principal amount. When any portion or the storage for future water supply is used, payment of both principal and interest for the portion used must be started, and the amount of the Project investment costs allocated thereto, with interest on the unpaid balance as provided above, shall be paid within the life of the Project in not to exceed 50 consecutive annual installments beginning within 30 days after the date of first use of such portion.

(4) An estimated schedule of annual payments for the storage provided for present demand is attached as Exhibit "B" of this contract. The annual payments as provided therein shall be made until the actual construction costs of the Project are determined. When the actual construction costs of the Project are determined, the annual payments due there – after will be adjusted to reflect any increase or decrease in the actual cost, including interest during construction, from the estimated amounts shown in Exhibit "A". Payment schedules for the storage provided for future water supply demands will be furnished by the Contracting Officer when use of such storage is started, and if based on estimated costs will be subject to revision when actual costs are known.

(5) If the User shall fail to make any of the aforesaid payments when due, then the overdue payments shall bear interest compounded annually at the applicable rate until paid. The amount charged on payments overdue for a

period of less than one year shall be figured on a monthly basis. For example, if the payment is made within the first month after being overdue (31 to 60 days after the anniversary date), one month's interest shall be charged. This provision shall not be construed as giving the User a choice of either making payments when due or paying interest, nor shall it be construed as waiving any other rights of the Government, at law or in equity, which might result from any default by User.

(6) The User shall have the right at any time it so elects to prepay the indebtedness under this Article 5(a), in whole or in part, with accrued interest thereon to the date of such prepayment.

(b) Major Capital Replacement Costs. The User will be required to pay 100 percent of the costs for any major capital replacement of specific water supply facilities. In addition, the User shall pay to the Government up to 67.69 percent of the costs of joint-use major capital replacement items. The required repayment for joint-use costs will be commensurate with the User's percentage of storage space presently in use. Payment shall be paid either in lump sum or annually with interest on the unpaid balance. If paid annually, the first payment shall be made with the first annual payment on the Project investment costs becoming due after the date said major capital replacement costs are incurred.

(c) Annual Operation and Maintenance Costs. The User will be required to pay the annual experienced operation and maintenance costs of specific water supply facilities. In addition, the User shall pay 34.109 percent of the annual experienced joint-use operation and maintenance costs of the Project until such time as the storage for

future water supply is used. As the storage provided for future water supply demands is used, the share of the annual experienced joint-use operation and maintenance costs, which the User will be required to pay in addition to the operation and maintenance costs of the specific water supply facilities, will be increased commensurate with the percentage of the water supply storage being used, up to a total of 71.54 percent of such costs.

ARTICLE 6 – Construction Cost Adjustments. All construction cost dollar amounts in this contract, including those in the appendices, are tentative only, based on the Government's best estimates. They will be adjusted upward or downward by the Contracting Officer when final construction costs become known, and the contract will be modified to reflect the adjustments.

ARTICLE 7 – Duration of Contract. This contract shall be effective when approved by the Secretary of the Army and shall continue in full force and effect for the life of the Project.

ARTICLE 8 – Permanent Rights to Storage. Upon completion of payments by the User, as provided in Article 5(a) herein, the User shall have a permanent right, under the provisions of the Act of 16 October 1963 (Public Law 88-140, 43 USC 390e), to the use of the water supply storage space in the Project as provided in Article 1, subject to the following:

(a) The User shall continue payment of annual operation and maintenance costs allocated to water supply.

(b) The User shall bear the costs allocated to water supply of any necessary reconstruction, rehabilitation or replacement of Project features which may be required to

continue satisfactory operation of the Project. Such costs will be established by the Contracting Officer. Repayment arrangements including schedules will be in writing and will be made a part of this contract.

(c) Upon completion of payments by the User as provided in Article 5(a) hereof, the Contracting Officer shall redetermine the storage space for municipal and industrial water supply, taking into account such equitable reallocation of reservoir storage capacities among the purposes served by the Project as may be necessary due to sedimentation. Such findings, and the storage space allocated to municipal and industrial water supply, shall be defined and described in an exhibit which will be made a part of this contract. Following the same principle, such reallocation of reservoir storage capacity may be further adjusted from time to time as the result of sedimentation resurveys to reflect actual rates of sedimentation and the exhibit revised to show the revised storage space allocated to municipal and industrial water supply.

(d) The permanent rights of the User under this contract shall be continued so long as the Government continues to operate the Project. In the event the Government no longer operates the Project, such rights may be continued subject to the execution of a separate contract, or additional supplemental agreement providing for:

(1) continued operation by the User of such part of the facility as is necessary for utilization of the water supply storage space allocated to it;

(2) terms which will protect the public interest; and

(3) effective absolvement of the Government by the User from all liability in connection with such continued operation.

ARTICLE 9 – Release of Claims. The User shall hold and save the Government, including its officers, agents and employees harmless from liability of any nature or kind for or on account of any claim for damages which may be filed or asserted as a result of the storage in the Project, or withdrawal or release of water from the Project, made or ordered by the User or as a result of the construction, operation, or maintenance of the facilities and appurtenances thereto owned and operated by the User, provided, that this shall not be construed as obligating the User to hold and save the Government harmless from damages or liability resulting from the sole negligence of the Government or its officers, agents, or employees and not involving negligence on the part of User or its officers, agents, or employees. The User shall also hold and save the Government free from all water-rights claims resulting from construction and operation, of the Project.

ARTICLE 10 – Assignment. The User shall not transfer or assign this contract or any rights acquired thereunder, nor suballot said water supply storage space or any part thereof, nor grant any interest, privilege or license whatsoever in connection with this contract, without the approval of the Secretary of the Army, provided that, unless contrary to the public interest, this restriction shall not be construed to apply to any water that may be obtained from the water supply storage space by the User and furnished to any third party or parties, nor any method of allocation thereof.

ARTICLE 11 – Officials Not to Benefit. No member or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefits.

ARTICLE 12 – Covenant Against Contingent Fees. The User warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee excepting bona fide employees or bona fide established commercial or selling agencies maintained by the User for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or, in its discretion to add to the contract price or consideration, or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.

ARTICLE 13 – Environmental Quality. During any construction, operation, and maintenance by User of any facilities, specific actions will be taken to control environmental pollution which could result from such activity and to comply with applicable Federal, State and local laws and regulations concerning environmental pollution. Particular attention should be given to (1) reduction of air pollution by control of burning, minimization of dust, containment of chemical vapors, and control of engine exhaust gases, and of smoke from temporary heaters; (2) reduction of water pollution by control of sanitary facilities, storage of fuels and other contaminants, and control of turbidity and siltation from erosion; (3) minimization of noise levels; (4) onsite and offsite disposal of waste and

spoil; and (5) prevention of landscape defacement and damage.

ARTICLE 14 – Federal and State Laws.

(a) In acting under its rights and obligations hereunder, the User agrees to comply with all applicable Federal and State laws and regulations, including but not limited to the provisions of the Davis-Bacon Act (40 USC 276a et seq.); the Contract Work Hours and Safety Standards Act (40 USC 327-333); and Title 29, Code of Federal Regulations, Part 3.

(b) The User furnishes, as part of this contract, an assurance (Exhibit C) that it will comply with Title VI of the Civil Rights Act of 1964 (78 Stat. 241, 42 USC 2000d, et seq.) and Department of Defense Directive 5500.11 issued pursuant thereto and published in Part 300 of Title 32, Code of Federal Regulations.

(c) The parties agree that this contract is not an obligation for which the full faith and credit of the State of Oklahoma is pledged. Nothing herein shall be construed as legally obligating the Oklahoma Legislature to make any appropriation of funds.

[Illegible]
G.P.S.
J.G.D.

ARTICLE 15 – Definitions.

(a) Joint-use costs – The costs of features used for any two or more project purposes.

(b) Project investment costs – The initial cost of the Project, including: land acquisition; construction; interest during construction on the value of land, labor, and materials used for planning and construction of the Project.

(c) Specific costs – The costs of project features normally serving only one particular project purpose.

(d) Interest during construction – An amount of interest which accrues on expenditures for the establishment of Project services during the period between the actual outlay and the time the Project is first made available to User for water storage.

ARTICLE 16 – Approval. This contract is subject to the written approval of the Secretary of the Army, and shall not be binding until so approved.

IN WITNESS WHEREOF, the parties have executed this contract as of the day and year first, above written.

APPROVED:

/s/ Howard H. Colloway
Secretary of the Army

DATE: 9 APR 1974

THE UNITED STATES OF AMERICA

By /s/ John G. Driskill
JOHN G. DRISKILL
Colonel, Corps of Engineers
District Engineer
Contracting Officer

[SEAL]

THE WATER CONSERVATION STORAGE COMMISSION OF THE STATE OF OKLAHOMA

REVIEWED FOR LEGAL SUFFICIENCY

By /s/ [Illegible] 2/16/74

By /s/ Lloyd E. Church
Chairman Lloyd E. Church, D.D.S.

TECHNICAL REVIEW

By /s/ [Illegible] 2/16/74

ATTEST:

By /s/ O.B. Saunders
O.B. Saunders, Secretary

It is my opinion that this contract is within the authority of the contracting agency and in reaching this conclusion I have considered the effect of Section 221 of the Flood Control Act of 1970 (42 USC 1962d-5b).

/s/ Larry Derryberry
ATTORNEY GENERAL
STATE OF OKLAHOMA

CERTIFICATE

I, O. B. Saunders, hereby certify that I am the Secretary, of the Water Conservation Storage Commission of the State of Oklahoma, named as User herein; that Lloyd E. Church who signed this contract on behalf of the User was then Chairman of said Water Conservation Storage Commission; that said contract was duly signed for and on behalf of said User by authority of its governing body, and is within the scope of its legal powers.

IN WITNESS WHEREOF, I have hereunto affixed my hand the seal of the Water Conservation Storage Commission of the State Oklahoma, this 16 day of Feb., 1974.

[SEAL] /s/ O.B. Saunders
O.B. Saunders

Contract No. DACW56-74-C-0

EXHIBIT A

I – RESERVOIR STORAGE

Feature	Elevation (ft MSL)	Usable Storage (1) (ac ft)	Percent of Conservation and Water Supply Storage
Flood Control	607.0 – 599.0	127,300	
Conservation			
Storage	599.0 – 542.0	297,200	100.00
Water Supply		297,200	100.00
Oklahoma Water Conservation Storage Commission			
Initial		141,700	47.678
Future		155,500	52.322
Total		424,500	

(1) Storage remaining after 100 years sedimentation.

II – ALLOCATION OF ESTIMATED FIRST COST (2)

Flood Control	$ 6,861,000
Water Supply:	
Storage	15,078,000
Conduit	103,000
Recreation & Fish and Wildlife	4,260,000
Total	$26,302,000

(2) First cost includes $102,000 for the present value of future recreation facilities. Total first cost of Project is $26,200,000

III – COSTS TO BE REPAID BY THE USER FOR WATER SUPPLY

INITIAL USE:		
Cost of 141,700 acre-feet of water supply storage (47.678% x $15,078,000)	=	$ 7,189,000
Outlet works specific to water supply		103,000
		$ 7,292,000
Interest during construction ($7,292,000 x 4.012% x 1/2 of 4-year construction period)		585,000
TOTAL INVESTMENT – INITIAL USE		$ 7,877,000
FUTURE USE:		
Cost of 155,500 acre-feet of water supply storage (52.322% x $15,078,00)	=	$ 7,889,000
Interest during construction ($7,889,000 x 4.012% x 1/2 of 4-year construction period)	=	633,000
TOTAL INVESTMENT – FUTURE USE	=	$ 8,522,000
TOTAL INVESTMENT – INITIAL & FUTURE USE		$16,399,000

IV – ALLOCATION OF ESTIMATED ANNUAL OPERATION, MAINTENANCE AND MAJOR REPLACEMENT COSTS

Item	Present	Future	Subtotal	FC,REC, F&WL	TOTAL
	$		$		$
Operation & Maintenance:					
Specific Cost	1,000	0	1,000	90,800	91,800
Joint-Use Cost	60,850(3)	66,750(4)	127,600	50,800	178,400
Total	61,850	66,750	128,600	141,600	270,200

Major Replacement:					
Specific Cost	800	0	800	1,900	2,700
Joint-Use Cost	420(3)	480(4)	900	400	1,300
Total	1,220	480	1,700	2,300	4,000

(3) Based on 47,678 percent of joint-use cost allocated to water supply.

(4) Based on 52.322 percent of joint-use cost allocated to water supply.

V – ANNUAL COSTS TO USER FOR INITIAL USE OF WATER SUPPLY STORAGE SPACE

Interest and amortization (5) 0.044847 x $7,877,000	=	$353,257
Operation and Maintenance (6)		
Joint-Use		
47.678% x 71.54% = 34.109% x $178,400	=	60,850
Specific Facilities		
100% x $1,000	=	1,000
Major Replacement (Estimated) (7)		
Joint-Use		
47.68% x 67.69% = 32.273% x $1,300	=	420
Specific Facilities		
100% x $800	=	800
TOTAL ESTIMATED ANNUAL COST	=	$416,327

(5) Based on 50 payments, 49 with interest.

(6) The first payment shall be due and payable on the date specified in Article 5a(2). Payment due prior to availability of actual experienced cost will be as shown.

(7) Major replacement costs are payable only when incurred.

Contract No. DACW56-74-C-0134

EXHIBIT B

AMORTIZATION SCHEDULE

TOTAL COST.....7877000.
NUMBER OF PAYMENTS 50
INTEREST RATE, PERCENT 4.012

ANNL PYMT NO	AMOUNT OF PAYMENT	APPLICATION		BALANCE
		INTEREST	ALLOC COST	ALLOC COST
	$	$	$	$
				7877000.00
1	353257.00		353257.00	7523743.00
2	353257.00	301?52.57	51404.43	7472338.57
3	353257.00	299790.22	53466.78	741??71.79
4	353257.00	297645.14	55611.86	7363259.93
5	353257.00	295413.99	57?43.?1	73?5416.92
6	353257.00	293093.33	60163.67	7245253.25
7	353257.00	290679.56	62577.44	7132675.31
8	353257.00	233163.95	650??.05	71175?7.76
9	353257.00	235557.62	67699.3?	70?????.3?
10	353257.00	232341.52	7041?.4?	6979472.90
11	353257.00	230016.45	73???.5?	6906232.35
12	353257.00	27707?.04	7617?.96	6?????.39
13	353257.00	274021.74	7923?.??	6750?1?.13
14	353257.00	270?42.32	82414.1?	666?4?3.95
15	353257.00	267536.37	65720.63	65?26?3.32
16	353257.00	26??97.23	89159.75	649????.?7
17	353257.00	260520.17	92730.?3	64007?6.74
18	353257.00	2567?9.5?	96457.44	???4???.??
19	353257.00	252929.69	100327.31	6204??1.99
20	353257.00	24?904.5?	104353.44	6099649.55

21	353257.00	244717.?4	103589.?6	509111?.49
22	353257.00	240363.35	112893.65	5373216.34
23	353257.00	235834.06	117422.94	5760793.90
24	353257.00	231123.05	122133.95	5638659.95
25	353257.00	226223.04	127033.96	5511625.99
26	353257.00	221126.43	132130.57	5379495.42
27	353257.00	215325.36	137431.64	5242063.7?
28	353257.00	210311.60	142945.40	5099113.3?
29	353257.00	204576.63	143630.37	4950433.01
30	353257.00	198611.57	154645.43	4795792.53
31	353257.00	192407.20	160849.30	4634942.78
32	353257.00	185953.90	167303.10	4467639.6?
33	353257.00	179241.70	174015.30	4293624.3?
34	353257.00	172260.21	130996.79	4112627.59
35	353257.00	16499?.62	18?253.38	392436?.?1
36	353257.00	157445.69	195?11.31	372?557.90
37	353257.00	1495?9.74	??3667.26	3524390.64
38	353257.00	14141?.61	21133?.?9	3313052.25
39	353257.00	132919.66	220337.34	3092714.91
40	353257.00	124079.72	229177.25	2563537.63
41	353257.00	114??5.13	23??71.?7	2635165.76
42	353257.00	105321.65	247935.35	237723?.41
43	353257.00	95374.4?	257??2.52	2119347.??
44	353257.00	35023.24	26?22?.76	1?51119.13
45	353257.00	74266.90	27?990.10	1572129.03
46	353257.00	63073.?2	2901?3.13	1231945.?5
47	353257.00	51431.67	??1??5.33	9??12?.52
48	353257.00	39322.44	313934.56	666135.96
49	353257.00	26727.33	326?29.?2	??9???.3?
50	353257.35	13627.01	339656.34	0.00

EXHIBIT C

DACW56-74-C-0134

ASSURANCE OF COMPLIANCE WITH THE DEPARTMENT OF DEFENSE DIRECTIVE UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

OKLAHOMA WATER CONSERVATION STORAGE COMMISSION
(hereinafter called "Applicant-Recipient")

HEREBY AGREES THAT it will comply with title VI of the Civil Rights Act of 1964 (Public Law 88-352) and all requirements imposed by or pursuant to the Directive of the Department of Defense (32 Code of Federal Regulations Part 300, issued as Department of Defense Directive 5500.11, 28 December 1964) issued pursuant to that title, to the end that, in accordance with the title VI of that Act and the Directive, no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant-Recipient receives Federal financial assistance from Department of the Army and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant-Recipient by the Department of the Army, assurance shall obligate the Applicant-Recipient, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this

assurance shall obligate the Applicant-Recipient for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant-Recipient for the period during which the Federal financial assistance is extended to it by Department of the Army.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Applicant-Recipient by the Department, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Applicant-Recipient recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant-Recipient, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant-Recipient.

Sections IV and VII of Department of Defense Directive 5500.11 setting forth prohibited discriminatory actions and compliance information is on the reverse hereof.

OKLAHOMA WATER
CONSERVATION
STORAGE COMMISSION
(Applicant-Recipient)

Dated 2-10-74

By /s/ [Illegible]

SECTIONS IV AND VII
DEPARTMENT OF DEFENSE DIRECTIVE 5500.11

IV. POLICY

A. *GENERAL.* No person in the United States shall, on the ground of race, color, or national orgin [sic] be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this Directive applies.

B. *SPECIFIC DISCRIMINATORY ACTIONS PROHIBITED.*

1. A recipient under any program to which this Directive applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national orgin [sic]:

a. Deny any individual any service, financial aid, or other benefit provided under the program;

b. Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

c. Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

d. Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by other receiving any service, financial aid, or other benefit under the program;

e. Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program.

f. Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program.

2. A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

3. As used in this Section the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

4. The enumeration of specific forms of prohibited discrimination in this Subsection does not limit the generality of the prohibition in Subsection IV.A. of this Section.

VII. Compliance Information

A. *Cooperation and Assistance.* Each responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this Directive and shall provide assistance and guidance to recipients to help them comply voluntarily with this Directive.

B. *Compliance Reports.* Each recipient shall keep such records and submit to the responsible Department official timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this Directive. In the case of any program under which a primary recipient extends Federal assistance to any other recipient, such other recipient shall also submit compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations imposed pursuant to this Directive.

C. *Access to Sources of Information.* Each recipient shall permit access by the responsible Department official during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this Directive. Where any information required of a recipient is in the exclusive possession of any other institution or person and this institution or person shall fail or refuse to

furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

D. *Information to Beneficiaries and Participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this Directive and its applicability to the program under which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this Directive.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. THE STATE OF OKLAHOMA and OKLAHOMA WATER RESOURCES BOARD, Defendant.	)	Case No. 98CV521K(E) JURY TRIAL DEMANDED

ANSWER

(Filed Aug. 10, 1998)

COME NOW Defendants State of Oklahoma and Oklahoma Water Resources Board (hereinafter collectively referred to as State) and for their answer to the allegations against them contained in Plaintiffs' Complaint state:

I.

Nature of Action

1. Admitted that this is an action allegedly based upon an arrangement created by the April 9, 1974 document executed by Plaintiff and Defendant State (Exhibit 1 to Plaintiff's Complaint).

2. Admitted.

3. Admitted that venue is proper in the Northern District of Oklahoma. However, venue would also be proper, and perhaps more appropriate and convenient, in the Eastern District of Oklahoma (where the subject

matter of this action, Sardis Lake, is located) or in the Western District of Oklahoma (where a qui tam action related to the construction of Sardis Lake, in which both Plaintiff and Defendant herein are named as defendants, is now pending – *Fent, et al. v State of Oklahoma, et al.*, CIV-98-221-M). The issue of the most appropriate and convenient venue may be raised by Defendant at a later date by a separate motion to transfer.

PARTIES

4. Admitted.

5. Admitted that Defendant State is duly authorized to enter into the arrangement described in paragraph 1 above.

6. Admitted that Defendant State is duly authorized to enter into the arrangement described in paragraph 1 above.

7. Admitted that the Oklahoma Water Resources Board is the legal successor in interest to the Oklahoma Water Conservation Storage Commission and that Defendant State was duly authorized to enter into the arrangement described in paragraph 1 above.

GENERAL ALLEGATIONS

8. No answer necessary; any document described in this paragraph speaks for itself.

9. Admitted that Defendant State entered into the arrangement described in paragraph 1 above.

WATER SUPPLY

10. No answer necessary; any document described in this paragraph speaks for itself.

11. No answer necessary; any document described in this paragraph speaks for itself.

12. No answer necessary; any document described in this paragraph speaks for itself.

13. No answer necessary; any document described in this paragraph speaks for itself.

14. Admitted that Plaintiff and Defendant State executed the document attached as Exhibit 1 to Plaintiff's Complaint.

15. No answer necessary; any document described in this paragraph speaks for itself.

16. No answer necessary; any document described in this paragraph speaks for itself.

17. No answer necessary; any document described in this paragraph speaks for itself.

18. Admitted that the notification described in this paragraph was received by Defendant State; the remaining averments in this paragraph are denied.

19. Admitted that payments described in this paragraph were made; the remaining averments in this paragraph are denied.

20. Admitted that the letter described in this paragraph was received by Defendant State; the remaining averments in this paragraph are denied.

21. Admitted.

22. Admitted that the letter described in this paragraph was received by Defendant State; the remaining averments in this paragraph are denied.

23. Admitted that the payment described in this paragraph was made; any document described in this paragraph speaks for itself; the remaining averments in this paragraph are denied.

24. Admitted that Plaintiff and Defendant State had discussions regarding Plaintiff's contentions that the arrangement was in default.

25. Admitted.

26. Admitted that the District Engineer on July 2, 1998 again declared the arrangement in default; the remaining averments in this paragraph are denied.

FIRST CLAIM FOR RELIEF – BREACH OF CONTRACT

27. No response necessary.

28. Denied.

29. Denied.

30. Denied.

SECOND CLAIM FOR RELIEF - ESTOPPEL

31. Denied.

32. Denied.

RELIEF REQUESTED

Defendant State prays that Plaintiff not be granted any judgment in its favor against Defendant State and that Plaintiff not be granted any relief, whether a declaratory judgment, injunctive relief, a judgment for costs, or any other relief, in law or in equity.

II.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a cause of action upon which relief can be granted.

2. It was the mutual understanding and intention of Plaintiff and Defendant State at the time that they entered into the arrangement created by the April 9, 1974 document that the cost of construction, operating and maintaining the project would be paid from the proceeds from the sale of water from storage at the lake. Due to factors under the control of Plaintiff, and/or due to factors not under the control nor foreseeable by Plaintiff and Defendant State, no water from storage at the lake has been sold.

3. Plaintiff has not fulfilled all of its obligations under the arrangement in good faith.

4. Plaintiff and Defendant State have modified the terms of the arrangement by virtue of their course of conduct since the execution of the April 9, 1974 document.

5. Plaintiff has an adequate remedy at law for all of the damages it has alleged, and is therefore not entitled to any equitable relief whether a declaratory judgment,

injunctive relief, a judgment for costs, or any other equitable relief.

6. Defendant State may assert additional affirmative defenses as this case progresses.

WHEREFORE, Defendant State prays that Plaintiff not be granted any judgment in its favor against Defendant State and that Plaintiff not be granted any relief, whether a declaratory judgment, injunctive relief, a judgment for costs, or any other relief, in law or in equity.

DATED this 6th day of August, 1998.

Respectfully submitted,

/s/ Robert M. Anthony

ROBERT M. ANTHONY, OBA #311
ASSISTANT ATTORNEY GENERAL
LITIGATION **DIVISION**
4545 North Lincoln Blvd., Suite 260
Oklahoma City, Oklahoma 73105-3498
521-4274 FAX (405) 528-1867

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid, on the 6th day of August, 1998, to:

Stephen C. Lewis
United States Attorney
Phil Pinnell
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

Lois J. Schiffer
Assistant Attorney General
Fred R. Disheron
Special Litigation Counsel
United States Department of Justice
Environmental and Natural Resources
Division
P.O. Box 7397
Benjamin Franklin Station
Washington, D.C. 20044-7397

Claire E. Douthit
Trial attorney
General Litigation Section
United States Department of Justice
Environment and Natural Resources
Division
P.O. Box 663
Washington, D.C. 20044-0663

John Roselle, Jr.
Kay Hoover
U.S. Army Corps of Engineers
P.O. Box 361
Tulsa, OK 74121-0061

/s/ Robert M. Anthony
ROBERT M. ANTHONY

[Exhibit 1 reproduced *infra* at pages 41 to 66.]